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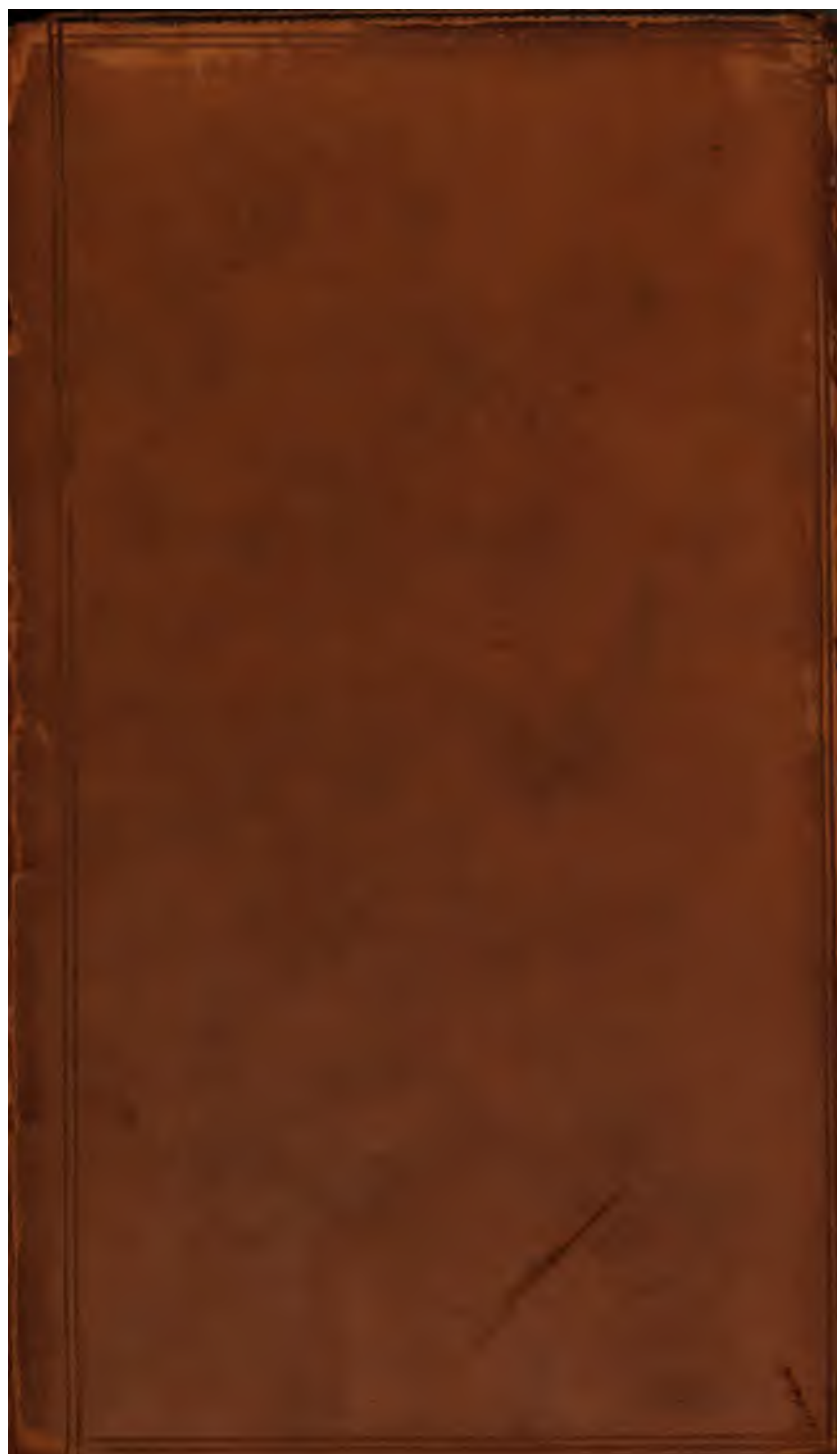
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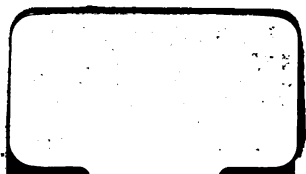
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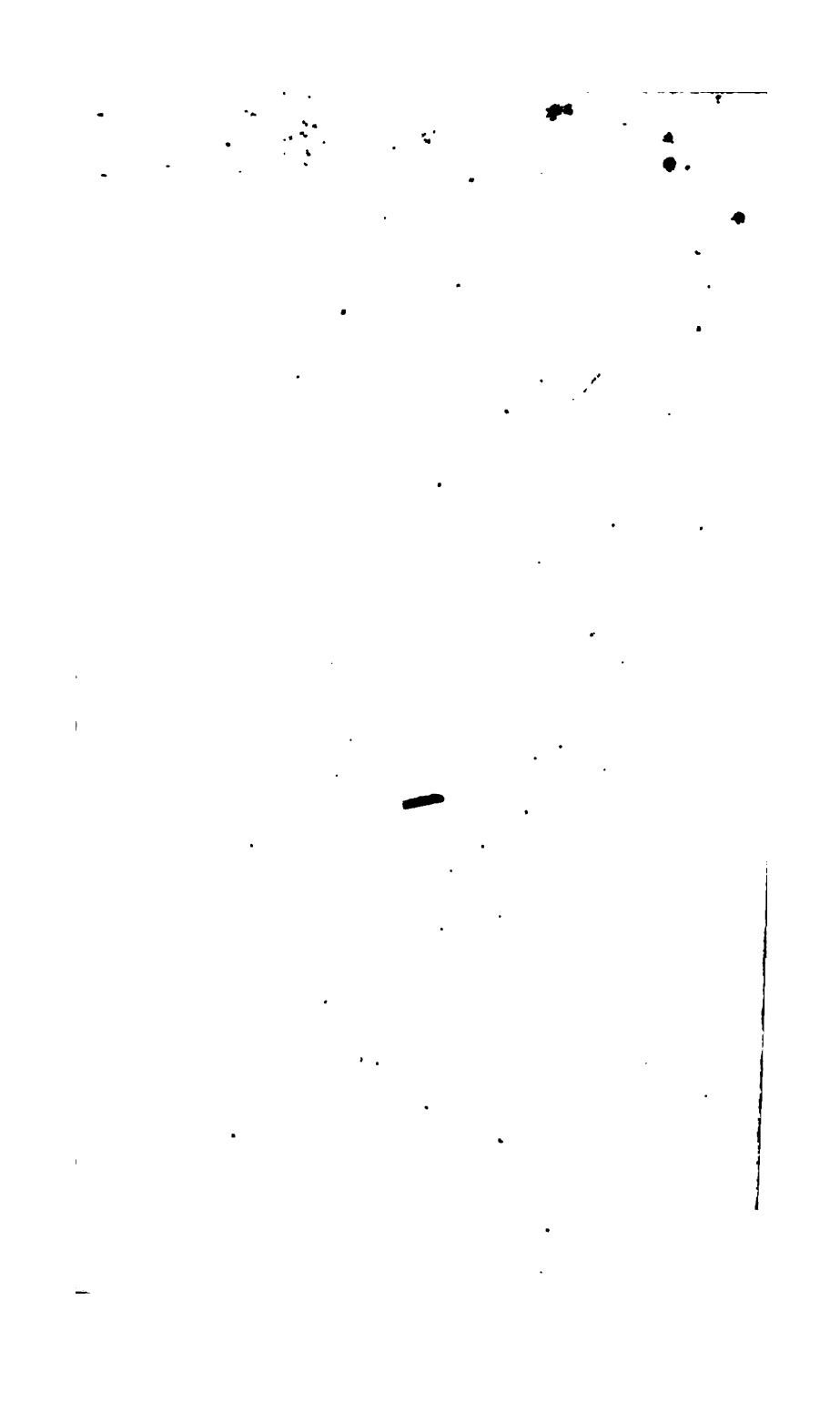
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THE  
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WITH FORMS,  
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AS TO ATTORNIES, AND THE CASES DECIDED THEREON;  
ALSO AN APPENDIX COMPRISING  
**Questions of Practice,**  
BY WHICH THE ERRORS IN PROCEEDINGS MAY BE DETECTED,  
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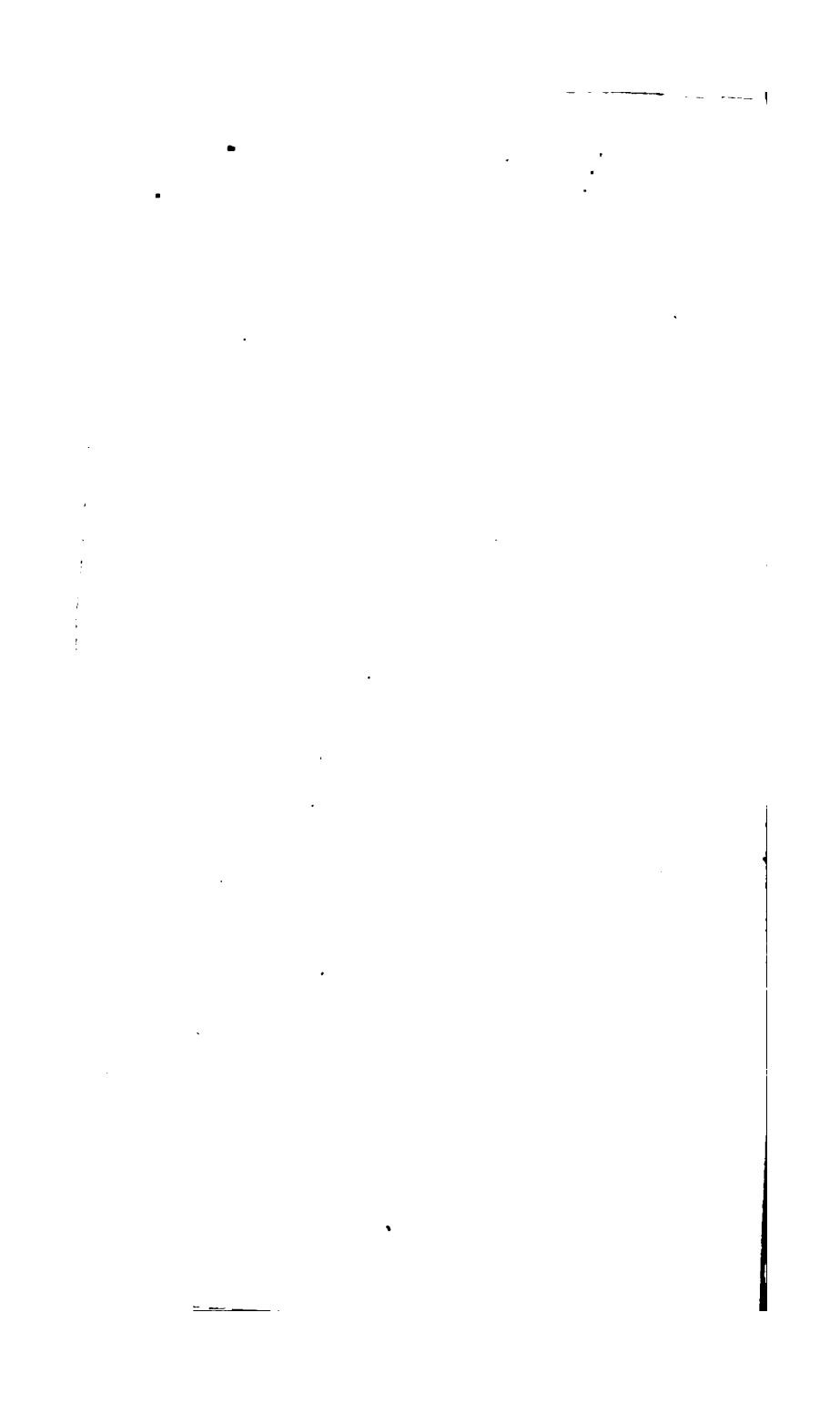
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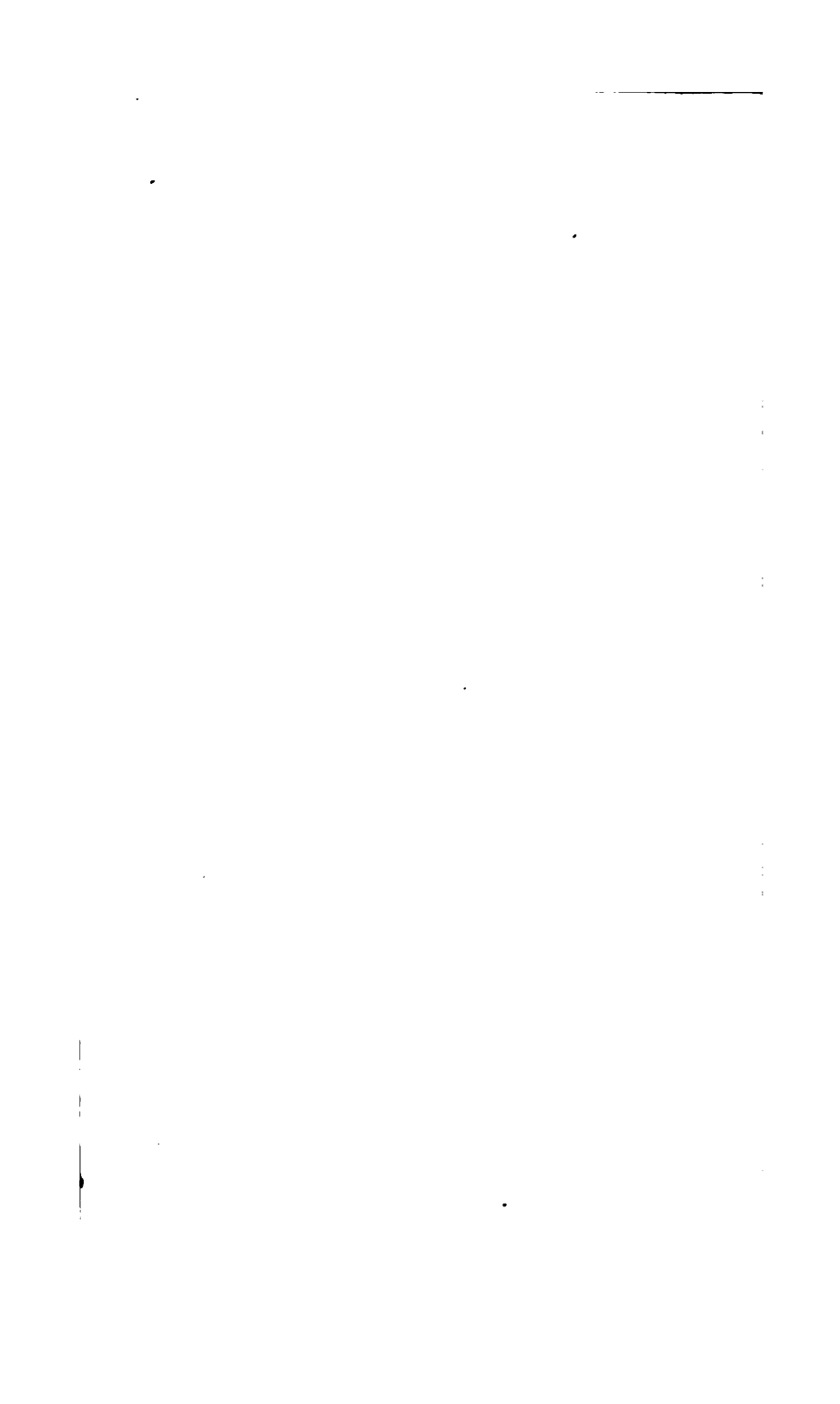
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BARRISTER-AT-LAW.

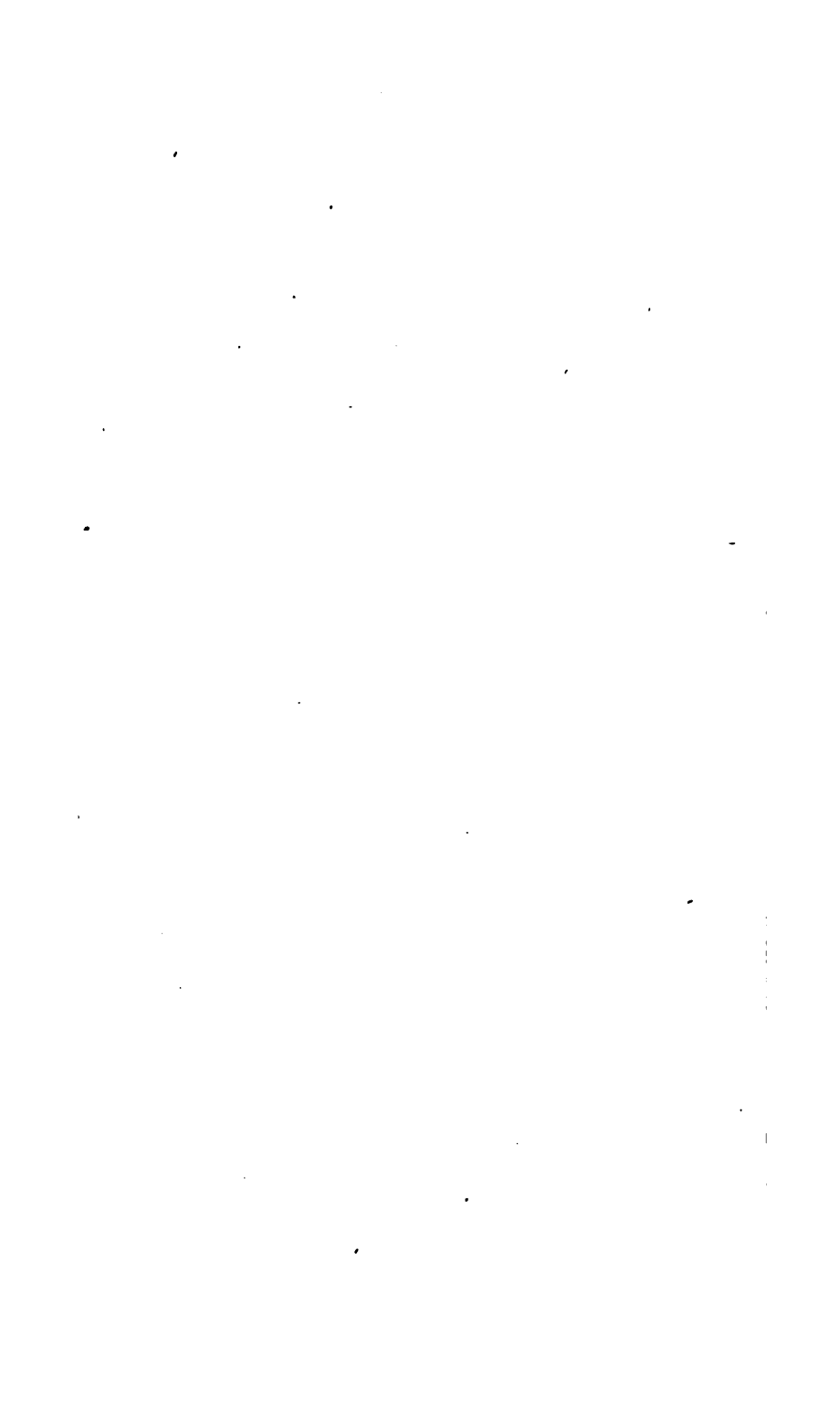
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# PREFACE

TO THE  
PRESENT EDITION.

---

MANY years since, I wrote a work upon the Practice of the Court of Common Pleas, which was published in the year 1829. That work had the advantage of being revised by Mr. Griffith, lately a secondary of the Court of Common Pleas, a gentleman whose perfect knowledge of the practice of that court was well known to, and highly appreciated by, the Profession. Afterwards, the practice of all the courts of common law at Westminster was assimilated, and much altered, by the statutes and new rules upon the subject, promulgated from time to time, from the year 1831 to the year 1834; and it was so much altered, that I found it impossible, with fairness to the Profession or satisfaction to myself, to give a new edition of that work, without re-writing nearly the whole of it. And as any new edition I could give of it, must have treated, not merely of the practice of the Common Pleas, but of the practice of all the courts, I thought it best, at once, to write a new work

upon the practice of all the courts, founded upon the new rules and statutes, without reference to my former work, or embodying any part of it in the new one. Before I would tax the Profession, however, with a new work upon the subject, I was desirous of waiting until the new practice, thus introduced, should settle down, and become fixed and well defined by decisions, so that I should be enabled to treat of the several parts of it with certainty and precision; and it was not, therefore, until the year 1838, that my new work was published. Mr. Cancellor, then a prothonotary and now a master of the Court of Common Pleas, and Messieurs Walker and Dax, masters of the Court of Exchequer, did me the favour to revise the whole of it, as it passed through the press; and to them I am indebted, in a great measure, for the character for accuracy which was afterwards bestowed upon the work. A new edition of it is now required; and I have undertaken it with pleasure, having obtained the promise of my friend Mr. Bunce, one of the masters of the Court of Queen's Bench, that he would revise it for me. He has done this, and done it most ably; so that I think I may now offer it to the Profession, with a confidence in its accuracy, that I never could have felt, if I had not been favoured with such able advice and assistance.

In the present edition I have made many alterations. I have altered the whole of the arrangement of the work. The former edition was arranged alphabetically; but as the Profession were not so much accustomed to that, as to the arrangement of the different parts of the subject in the order in which they occur in practice, I have upon this occasion adopted the latter mode of arrangement. After treating of the court and its officers, including sheriffs and their duties, and proceedings against them, including also the whole of the law relating to attorneys and their articled clerks, I have, in the first place, treated of the proceedings in actions generally, —the limitation of action, and the mode of entering process on the roll, to save the statute of limitations, —the process and other proceedings in the action, to declaration: namely, the writ of summons, the distringas, the appearance, outlawry, the writ of capias, bail bond and bail, the removal of causes from inferior courts, and the declaration, change of venue, consolidating of actions, and inspection of deeds and papers, &c.:—then the pleadings and other proceedings to issue, namely,—security for costs, particulars of demand and set off, staying proceedings,oyer, interpleader in ordinary cases, plea, plea of set off, plea of tender, plea of payment of money into court, plea of *nul tiel record*, plea in abatement, plea

to the jurisdiction and claim of conusance, plea *puis darrein continuance*, judgment by default, writ of enquiry, reference to the master to compute principal and interest; replication, &c.; demurrer; the issue, breaches in debt on bond, notice of trial, *nolle prosequi*; cognovits and warrants of attorney:—then the proceedings to trial and verdict, namely, judgment as in case of nonsuit, costs of the day for not proceeding to trial, trial by proviso; the nisi prius record, jury process, view; the jury; the brief; putting off the trial; trial at bar, trial at *nisi prius*, trial before the sheriff, &c.; documentary evidence, witnesses; demurrer to evidence, bill of exceptions; nonsuit, verdict, special case; death or marriage of parties before or after verdict, &c., its effect upon a suit.

In the second volume, I proceed with the action to judgment and execution:—the motion for a new trial, *venire de novo*, arrest of judgment, judgment, judgment *non obstante veredicto*, *scire facias*, *remititur damna*, costs, execution, set off of judgment and costs, and entry of satisfaction upon the roll. Next, I treat of the writ of error, and amendments. I then give the proceedings in particular actions,—ejectment, replevin, penal actions, and feigned issues. I next treat of actions by and against particular persons,—by and against Attornies, bankrupts

and their assignees, corporations, executors and administrators, husband and wife, idiots and lunatics, infants, insolvents, against justices of the peace, constables, &c., actions by paupers, actions against peers and members of parliament, and actions against prisoners. I then treat of arbitration; next of rules, judges' orders, affidavits, &c.; and lastly I treat of irregularities, and the mode of taking advantage of them.

There is one novelty in this edition, which I think deserves to be mentioned particularly. In an Appendix to each of the volumes, I have given a collection of Questions upon those parts of the practice treated of in the volume. I think this will be found of great use, particularly by the younger members of the Profession; it will give them the habit of examining, as well their own proceedings as those of their adversaries, and an extraordinary facility in detecting the errors which may be in them. The mode of taking advantage of these errors is also given, by reference to those parts of the body of the work where the law and practice upon the subjects respectively are stated. To persons well versed in the practice of our courts, and in the habit of critically examining the proceedings in them as they occur in practice, and who can see at a glance any errors which may be in them, this portion of my labours

may perhaps appear unnecessary; but even by them I think it will be found useful, in the hurry of business, when an error in proceedings may often escape detection, which would at once be rendered obvious by the aid of this Appendix. But to the younger members of the Profession I think it will be of great importance, in rendering them critically exact and accurate in their own proceedings, and in giving them a facility in detecting every error which may be committed by their adversaries.

As to the manner in which my labours upon this occasion have been performed, I have merely to say, that I have taken infinite pains to render this work accurate in every respect, and ready of reference. And if the Profession shall be of opinion that I have succeeded in attaining these objects, I desire no higher commendation for the work.

J. F. ARCHBOLD.

4, *King's Bench Walk,*  
*Temple.*

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## BOOK I.

### THE COURTS OF COMMON LAW AT WESTMINSTER, AND THE JUDGES AND OFFICERS THEREOF.

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#### CHAPTER I.

##### *The courts, and their jurisdiction, sittings, &c.*

*Their jurisdiction.*] The courts of Common Law at Westminster, namely, the courts of Queen's Bench, Common Pleas and Exchequer, have jurisdiction in all personal actions ; and these actions are now commenced, uniformly, in all these courts, by writ of summons in ordinary cases, by writ of detainer against a prisoner, or by a special writ of summons against a member of parliament subject to the bankrupt laws, when it is intended to proceed against him under stat. 6 G. 4, c. 16, s. 10. They also have jurisdiction in ejectment.

The court of Queen's Bench has a peculiar criminal jurisdiction ; and all proceedings to obtain and prosecute writs of mandamus, and informations in nature of the writ of quo warranto, belong exclusively to that court.

The court of Common Pleas had formerly exclusive jurisdictions in real actions ; and in mixed actions (excepting ejectment), unless the action were at the suit of the King or Queen regnant, in which case the court of Queen's Bench, and perhaps the court of Exchequer, had a concurrent jurisdiction with it. And the court of Common Pleas has still jurisdiction in the writ of right of dower, dower *unde nihil habet*, and quare impedit ; all other real and mixed actions (excepting ejectment) being abolished by stat. 3 & 4 W. 4, c. 27, s. 37.

The court of Exchequer has exclusive jurisdiction in all matters of revenue, not determinable before the commissioners of excise or justices of the peace, and not amounting to an indictable offence. It has also exclusive jurisdiction as to all debts due to the crown.

By stat. 11 G. 4 & 1 W. 4, c. 70, ss. 13, 14, the jurisdiction of these courts was extended to Wales and the county palatine



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of Chester, in as full a manner, for every purpose, as they exercised it in any English county; and the court of session and court of Exchequer of Chester, and the courts of great sessions in Wales, were abolished.

The judges of the courts of Queen's Bench and Common Pleas, constitute the court of error, in error from the Exchequer; the judges of the court of Queen's Bench and barons of the Exchequer, constitute the court of error, in error from the Common Pleas; and the judges of the court of Common Pleas and the barons of the Exchequer, constitute the court of error, in error from the court of Queen's Bench. *See stat. 11 G. 4 § 1 W. 4, c. 70, s. 8.*

*The terms.]* Hilary term begins on the 11th, and ends on the 31st of January; Easter term begins on the 15th of April, and ends on the 8th of May; Trinity term begins on the 22d of May, and ends on the 12th of June; and Michaelmas term begins on the 2d, and ends on the 25th of November: provided that if the whole or any number of the days intervening between the Thursday before and the Wednesday next after Easter day, shall fall within Easter term, there shall be no sittings in banc on any of such intervening days, but the term shall in such a case be prolonged, and continue for such number of days of business as shall be equal to the number of intervening days before mentioned, exclusive of Easter day; and the commencement of the ensuing Trinity term shall in such case be postponed, and its continuance prolonged for an equal number of days of business. *11 G. 4 & 1 W. 4, c. 70, s. 6.* These intervening days, however, shall be deemed a part of the term, although there shall be no sittings in banc upon them; *1 W. 4, c. 3, s. 3*; but they shall not be reckoned or included in any rules or notices or other proceedings, except notices of trial, and notices of enquiry. *R. G. E. 2 W. 4.* If the day on which the term is thus to end, should happen to fall on Sunday, the Monday next following shall be deemed the last day of the term. *1 W. 4, c. 3, s. 3.*

Formerly writs must have been made returnable in term, and it is still required in the real and mixed actions of which the court of Common Pleas has exclusive jurisdiction, as above mentioned. But now, the writ of summons in personal actions, does not specify any day on which it is returnable, but it is deemed returnable as soon as it is executed, and the defendant must appear to it within eight days afterwards, at his peril. So, writs of execution are now made returnable *immediatè*. It is not necessary, therefore, to give any list here of what were formerly called the general return days of a term.

*Proceedings in vacation.]* Besides the delay formerly occasioned in actions in the common law courts, by writs being

always made returnable in term only, there were also many other cases in which a plaintiff was prevented from proceeding in his action in vacation. But now, by stat. 2 W. 4, c. 39, s. 11, after reciting this, it is enacted that if any writ of summons or detainer "shall be served or executed on any day, whether in term or vacation, all necessary proceedings to judgment and execution may (except as hereinafter provided) be had thereon without delay, at the expiration of eight days from the service or execution thereof, on whatever day the last of such days may happen to fall, whether in term or vacation." The section then contains the three following provisos, the first and last of which are partial exceptions to the above enactment, viz. :—

1. It is provided that "if the last of such eight days shall happen to fall on a Sunday, Christmas day, or any day appointed for a public fast or thanksgiving, the following day shall be considered as the last of such eight days; and if the last of such eight days shall happen to fall on any day between the Thursday before and the Wednesday after Easter day, then the Wednesday after Easter day shall be considered the last of such eight days."

2. It is provided that "if such writ shall be served or executed on any day between the 10th August and the 24th of October, bail may be put in by the defendant in bailable cases, or appearance entered by the defendant or plaintiff on process not bailable, at the expiration of such eight days." What the meaning of this proviso is, is not very easily discoverable: it merely enables a defendant to do that which he might have done without it, and which he must have done within the meaning of the above general rule. However, it is quite clear that it does not amount to any exception to the general enactment.

3. It is provided that "no declaration, or pleading after declaration, shall be filed or delivered between the 10th August and the 24th October;" or if delivered, it may be treated as a nullity. See *Mills v. Brown*, 9 Dowl. 151. And by R. G. M. 3 W. 4, s. 12., "in case the time for pleading to any declaration, or for answering any pleadings, shall not have expired before the 10th August, the party called upon to plead, reply, &c. shall have the same number of days for that purpose after the 24th October, as if the declaration or preceding pleading had been delivered or filed on the 24th October." And where a defendant obtained an order for a month's time to plead, on the 7th of August, the court held that he had a month, all but three days, after the 24th October to plead. *Trinder v. Smedley*, 3 Dowl. 87. And where a defendant obtained a month's further time to plead, on the 5th September, the court held that the month did not begin to run until the 24th October. *Le Fevre v. Molineux*, 6 Dowl. 153. Therefore when an application under these circumstances is made for time to plead,

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&c., the plaintiff's attorney should stipulate, and have it expressly inserted in the order, as one of the terms for granting further time, that the defendant shall plead at or before the expiration of the time given by the order, notwithstanding the statute and rule of court above mentioned, otherwise that he shall be at liberty to sign judgment.

With these two exceptions, proceedings may now be had in vacation, in the same manner as formerly in term time.

*Sittings in banc in vacation.*] By stat. 1 & 2 Vict. c. 32, s. 1, the courts of Queen's Bench, Common Pleas, and Exchequer, may, at their discretion, hold sittings in banc in vacation, at such times as are now appointed for holding sittings at *nisi prius* in London and Middlesex, for the purpose of disposing of business then pending and undecided in such courts respectively. And the judgments pronounced, and rules and orders made, at such sittings, shall have the same effect as if pronounced or made in term time. *Id.* s. 3. These sittings shall be holden in pursuance of a rule or order of the court, of which one week's notice shall be given in the gazette. *Id.* s. 2. See *De Rossi v. Polhill*, 9 *Law J.* 334, *cp.*

So trials at bar may be appointed for the vacation; and the time so appointed shall be deemed part of the preceding term. 11 *G. 4* & 1 *W. 4*, c. 70, s. 7.

*Holidays.*] There was formerly a long list of holidays established by stat. 5 & 6 Ed. 6, c. 3, any of which, if occurring in term time, was deemed a *dies non*. But by stat. 3 & 4 *W. 4*, c. 42, s. 43, none of the holidays specified in the statute of Edward, shall now be observed or kept in the superior courts of Common Law, except Sundays, the day of the nativity of our Lord and the three following days, and Monday and Tuesday in Easter week. To these are added the whole of the days between the Thursday before and the Wednesday next after Easter day, if they occur in Easter term. 11 *G. 4* & 1 *W. 4*, c. 70, s. 6, *ante p.* 2.

*Computation of time.*] By R. G. H. 2 *W. 4*, r. 8, it is ordered that "in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the courts, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas day, Good-Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also."

And by R. G. E. 2 *W. 4*, it is ordered that "the days between Thursday next before and the Wednesday next after Easter day, shall not be reckoned or included in any rules, or

notices, or other proceedings, except notices of trial or notices of enquiry, in any of the courts of law at Westminster." And this rule is not affected by stat. 2 W. 4, c. 39, s. 11 (*ante* p. 11,) subsequently passed, which was intended merely to remedy the inconvenience arising from the return of writs; and therefore where a replication was delivered on the Wednesday before Easter day, and a demurrer to it not until the Wednesday after, the court held that the latter was delivered in time. *Harrison v. Tate et al.* 4 Bing. N. C. 443. And in all other cases, where particular days being directed to be kept as holidays at the offices of these courts, prevent a person from taking a step in a cause, such holidays from necessity shall not be reckoned within the time otherwise limited for taking such step; and therefore where a declaration, indorsed to plead in four days, was filed and notice given of it on the 24th December, and judgment for want of a plea was signed on the 29th, Gurney B. held it to be irregular; for Christmas day and the three following days being declared to be holidays in the offices by stat. 3 & 4 W. 4, c. 42, s. 43, the defendant could not take the declaration out of the office in time to plead. *Wheeler v. Green*, 7 Dowl. 194. Also, in moving for a new trial, where the cause has been tried in vacation, an intervening Sunday does not reckon in the four days limited for that purpose. But in all other cases, a holiday reckons, unless it be the last day of the time appointed for taking the particular proceeding.

*Term's notice, where required, and how given.*] Where no step has been taken in a cause for four terms, the courts, in order to prevent parties from being taken by surprise, require that either party, intending to take any further proceeding in the cause, shall give to the other a term's notice thereof. See *Doe d. Vernon v. Roe*, 7 Ad. & El. 14. This however is not necessary with respect to any proceeding after verdict, *May v. Wooding*, 3 M. & S. 500, if the verdict be acquiesced in and no new trial granted. *Tipton v. Meeke*, 8 Moore, 579. *Deacon v. Fuller*, 1 Cr. & M. 349. Nor is it necessary, to enable the defendant to go to trial by proviso, *Theobald v. Crickmore*, 2 B. & A. 594, or to move for judgment as in case of a nonsuit, *Manby v. Wortly*, 2 W. Bl. 1223. *Doe v. Moses*, 5 T. R. 634. *Shinfield v. Laxton*, 2 Dowl. 778, or to move to set aside proceedings. *Lumley v. Hempson*, 3 Mees. & W. 632. Nor is it necessary for the plaintiff to give a term's notice, where his not having proceeded arose from the defendant's having prevented or delayed him, *Bosworth v. Philips*, 2 W. Bl. 784. *Hayley v. Riley*, 1 Doug. 71. *Watkins v. Haydon*, 2 W. Bl. 762, or where the proceedings have been delayed at the defendant's request. *Bland v. Darley*, 3 T. R. 530, *Evans v. Davies*, 3 Dowl. 786.

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Moving for a concilium, within the four terms, although the rule was not served until afterwards, has been deemed a proceeding in the cause, so as to render a term's notice unnecessary. *Bland v. Darley*, 3 T. R. 530. So is a notice of trial, although countermanded. 3 East, 2 n. So, where plaintiff gave notice of his intention to proceed, within the four terms, but took no step in consequence, it was holden that this notice within the year rendered the term's notice unnecessary. *Richards v. Harris*, 3 East, 1. But merely obtaining an order to change the attorney, is not sufficient for this purpose. *Deacon v. Fuller*, 1 Cr. & M. 349. So, the attorney's writing to the attorney of the opposite party, asking what course his client meant to take, and threatening immediate proceedings, and at another time stating to him in conversation what evidence he had,—have been holden not to dispense with the notice. *Doe d. Vernon v. Roe*, 7 Ad. & El. 14.

The form of the notice is usually thus: *Take notice that the [plaintiff] intends to proceed in this cause, after the end of the next term, by [here mention the proceeding intended to be taken.]* Let it be intitled in the court and cause, and signed and directed, as any other notice in the cause. It must be given before the term; and in the vacation after the term the party may proceed in the action, by taking that step which was mentioned in his notice. See *Milbourne v. Nixon*, 2 T. R. 40. In one case it seems to have been decided that, instead of giving notice of an intention to proceed, as for instance, notice of an intention to give notice of enquiry, you might at once give the term's notice of enquiry. *Smith v. Paul*, 3 Smith, 101. It was afterwards ruled otherwise. *Smith v. Colman*, M. S. e., 1820. But since that, by R. G. H. 2 W. 4, it is ordered that "where a term's notice of trial or enquiry is required, such notice may be given at any time before the first day of term;"—seemingly meaning that the notice of trial or enquiry itself may be given at that time.

*Who may practise in these courts.]* The parties respectively in any action or other proceeding in these courts, may conduct and advocate their cause in person, without the aid of counsel or attorney. Or a party may have his cause conducted out of court by an attorney, and be his own advocate at the trial. Or he may advocate his own cause at the trial, and may have counsel to argue any points of law that may arise in the course of it; but if he chuse to address the jury, he must also examine the witnesses, for counsel will not be allowed to do that for him. *Shuttleworth v. Nicholson*, 1 Moody & R. 254.

No person, however, is allowed to act as advocate for another, in the courts of Queen's Bench and Exchequer, but a serjeant at law or barrister, or an advocate of the ecclesiastical or admiralty courts; and none but serjeants at law are

allowed to act as advocates in the court of Common Pleas (unless at *nisi prius*), it being now expressly decided that they have the "exclusive privilege of practising, pleading and audience" in that court. *In the matter of the Serjeants at law*, 8 Dowl. 268, 9 Law J. 339 cp.

And no person is allowed to conduct a cause in these courts, or take any proceeding in it, for another, as his attorney or agent, but an attorney regularly admitted by, and on the rolls of, some one of these courts. *Vide post*, tit. "Attorney."

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## CHAPTER II.

### The Judges.

Each of the courts of Queen's Bench and Common Pleas, consists of a chief justice and four puisne judges, and the court of Exchequer of a chief baron and four puisne barons. Only three puisne judges or barons, however, can sit in banc at the same time, unless in the absence of the chief justice or chief baron respectively; 11 G. 4 & 1 W. 4, c. 70, s. 1; but the other puisne judge or baron may sit apart from the court, "for the business of adding and justifying bail, discharging insolvent debtors, administering oaths, receiving declarations required by statute, hearing and deciding upon matters on motion, and making rules and orders in business depending in the court."

*At nisi prius.*] Three sittings at *nisi prius* in each term, for Middlesex, and one for London, are usually appointed by each of these courts, a few days before the first day of the term, and each sitting is continued *de die in diem* until the list of causes has been disposed of. The sittings at *nisi prius* after term, are now restricted to 24 days (exclusive of Sundays) after Hilary, Trinity and Michaelmas terms respectively, and to six days after Easter term, for both London and Middlesex; but with the consent of parties, causes may be tried even after the expiration of that period. 11 G. 4 & 1 W. 4, c. 70, s. 7. And every judge of these courts, to whatever court he may belong, is authorized to sit in London and Middlesex, for the trial of issues arising in any of the said courts. *Id.* s. 4.

*At chambers.*] Every judge of these courts, to whatever court he may belong, is authorized to transact such business at chambers or elsewhere, depending in any of the said courts, as relates to the matters over which the said courts have a common jurisdiction, and as may, according to the course and practice of the court, be transacted by a single judge. 11 G. 4 & 1 W. 4, c. 70, s. 4. And by stat. 1 & 2 Vict. c. 45, s. 1, every judge of the said courts shall have equal jurisdiction, power and authority to transact out of court such business as

may, according to the course and practice of the court be so transacted by a single judge, relating to any suit or proceeding in either of the said courts of Queen's Bench, Common Pleas, or on the common law or revenue side of the court of Exchequer,—or relating to the granting of writs of certiorari or habeas corpus,—or the admitting prisoners in criminal charges to bail,—or the issuing extents or other process for the recovery of debts due to her Majesty,—or relating to any other matter or thing usually transacted out of court,—although the said courts have no common jurisdiction therein,—in like manner as if the judge transacting such business had been a judge of the court to which the same by law belongs.

As to the business usually transacted at chambers, we shall treat of it fully in a subsequent part of this work, under the title "*Judges' orders.*"

*On circuit.*] Besides the trial of causes &c., the judges on their circuits, respectively, are authorized to grant summonses and make orders, in all actions and prosecutions, which, if brought to trial, would be tried upon their circuit, whether they be judges of the courts respectively in which the records in such actions or prosecutions were made up or not. 1 G. 4, c. 55, s. 5. The stat. 1 & 2 Vict. c. 45, s. 1, above mentioned, also, is applicable to the judges on circuit, as well as in chambers or elsewhere.

*Their authority to make general rules.*] The judges of each of these courts had always authority to make rules to regulate the practice of their own court. But when it was first intended to introduce an uniformity of practice in these courts, it became necessary to give the judges of all these courts, collectively, a power to make rules for that purpose; and therefore it was enacted by stat. 11 G. 4 & 1 W. 4, c. 70, s. 11, that in all cases relating to the practice of the courts of King's Bench, Common Pleas and Exchequer, in matters over which these courts have a common jurisdiction, or of or relating to the practice of the court of error, "it shall be lawful for the judges of the said courts jointly, or any eight or more of them, including the chiefs of each court, to make general rules and orders for regulating the proceedings of all the said courts; which said rules and orders, so made, shall be observed in all the said courts; and no general rule or order respecting such matters shall be made in any manner, except as aforesaid." Also by the act for the uniformity of process (2 W. 4, c. 39), the judges are, in like manner, to make rules for the effectual execution of that act, and for fixing the costs to be allowed in respect of the matters therein contained; s. 14; and the judges of each court may make rules for the conduct of their officers relating to the distribution and performances of the duties and business to be performed in the execution of that act. *Sect.* 18.

And lastly, by stat. 3 & 4 W. 4, c. 42, s. 1, the judges of these courts, or any eight of them, (of whom the chiefs of these courts should be three,) may, at any time within five years from the 1st June 1833, make rules and orders for such alteration in the mode of pleading in the said courts, and in the mode of entering and transcribing pleadings, judgments and other proceedings, and other regulations as to the payment of costs and otherwise for carrying into effect the said alterations, as to them might seem expedient. This power was afterwards renewed for five years from the 1st November 1838, by stat. 1 & 2 Vict. c. 100, with this proviso, that any rules or orders made under the authority of it, should be laid before Parliament, and not come into force for six months afterwards; before which time, the Queen by her proclamation, or either house of parliament by a resolution, may suspend such rules or any part of them.

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### CHAPTER III.

#### *The immediate officers of these courts.*

*The masters.*] By stat. 1 Vict. c. 30, the offices of the different officers on the civil side of the court of Queen's Bench, of the Common Pleas, and on the plea side of the Exchequer, have been abolished; and five masters are appointed for each court, who are to execute the several duties of the offices thus abolished; *sects. 1, 3, 5 & Schs. A. B.*; and for that purpose the new masters may appoint so many clerks and messengers, as the chief justice or chief baron of their court shall deem necessary. *Sect. 12.*

All money paid into court, after an entry thereof shall be made in books to be kept for that purpose, shall be paid by the masters into the bank of England; and the masters of each court, or any two or more of them, may afterwards draw upon the bank, for any sums they may require in the course of a suit. *Sect. 9.*

Also, by sect. 23, the masters are "authorized, empowered and required, subject to such rules and orders as hereinafter mentioned, to tax all bills of costs indiscriminately, which shall have arisen or which may arise in cases of a civil nature in any of the said courts, or in the court of error in the exchequer chamber, although such costs may not have arisen in respect of business done in the court to which such masters may belong; and the judges of the said courts, or any eight or more of them, of which the chiefs of each of the said courts shall be three, shall and they are hereby required, by any rule or order to be from time to time made either in



term or vacation, to establish such regulations as may be necessary for the purpose of enforcing uniformity of practice in the allowance of costs in the common law courts, and of insuring as far as may be practicable an equal division of the business of taxation amongst the masters of the said courts; and such judges shall appoint some convenient place, in which the said business of taxation shall be transacted for all the said courts."

The courts frequently refer matters to these masters, in order that they shall make enquiry into and ascertain particular facts; and when thus ascertained, the courts act upon them. The ordinary reference to the master, in actions upon bills of exchange and the like, to compute the principal and interest due upon them, instead of executing a writ of enquiry, shall be fully noticed in a subsequent part of this work. But besides this, generally, in matters coming before the court by rule, where there are long and intricate affidavits, or where the character of an attorney is implicated, the court very often refer such matters to the master, with directions to report to them the facts. The affidavits are thereupon lodged with the master, and he may call for fresh affidavits from either party, if he will; but the court have no power to compel the attendance of any witnesses before him. *M'Dougal v. Nicholls*, 1 Har. & W. 341. The master, after hearing the parties or their counsel, prepares his report; and when it is ready, upon the motion of either party, he will read it to the court, and the court thereupon dispose of the original rule.

*The marshal and warden.*] The marshal of the Queen's Bench prison, has the government of that prison, and the custody of all prisoners committed there by any of the judges of the court of Queen's Bench. He is an officer of that court. The prison of the Fleet is appropriated to prisoners committed by the judges of the court of Common Pleas or barons of the exchequer, and is under the government of a warden, usually called the warden of the Fleet. The warden is deemed an officer of both these courts, and of the Court of Chancery also.

By R. G. H. 2 W. 4, the marshal and warden shall present to the judges of the courts of Queen's Bench, Common Pleas, and Exchequer, in their respective chambers at Westminster, within the first four days of every term, a list of all such prisoners as are supersedeable, showing as to what actions and on what account they are so, and as to what actions (if any) they still remain not supersedeable. And if any prisoner, who according to the ordinary practice would be entitled to a supersedeas, be not entitled thereto for any special reason, the party at whose suit he is detained shall give notice thereof to the marshal or warden respectively, who shall thereupon enter the same in the books of the prison, "and shall also present to the

judges of the respective courts from time to time a list of the prisoners to whom such special matter shall relate, showing such special matter, together with the list of the prisoners supersedeable." *Id.* s. 87.

*Commissioners.*] Commissioners for taking affidavits, are appointed by virtue of stat. 29, C. 2, c. 5, in every place of any importance throughout England and Wales, by commission from the chief and one or more of the puisne judges of each of these courts, for the taking of affidavits in all matters or causes depending or to be depending in these courts respectively. They are nearly in all cases attorneys of the court. The courts have also appointed commissioners in Scotland and Ireland, for the same purpose, in pursuance of stat. 3 & 4 W. 4, c. 42, s. 42.

Also persons "other than common attorneys or solicitors" are appointed in every place of any importance, throughout England and Wales, by commission from the chief and one or more of the puisne judges of each of these courts, for the taking of recognizances of bail in any action depending in this court, by virtue of stat. 4 W. & M. c. 4, s. 1.

*Fees of the officers of the court.*] The following table of fees, prepared pursuant to the statute 1 Vict., c. 30, s. 6, by commissioners appointed under stat. 11 Geo. 4 & 1 W. 4, c. 58, has been allowed and sanctioned by the judges of the superior courts of Common Law at Westminster, and established for the said courts.

No fee whatever to be taken not comprised in this table; and whenever, by any change in the practice, any duty shall cease to be performed, the fee thereon also to cease.

1. *Writ Fee.*

	£.	s.	d.
<i>For Signing, Sealing, and, where necessary, Entering, every Writ, and for Filing the same, and Indorsing the day and hour when filed:—</i>			
Writ of Capias .. .. .	0	5	0
Alias Writ of Capias .. .. .	0	2	6
Pluries .. .. .	0	2	6
Writ of Summons .. .. .	0	5	0
Alias or Pluries .. .. .	0	2	6
Writ of Distringas . . . . .	0	5	0
Alias or Pluries .. .. .	0	2	6
Writ of Detainer .. .. .	0	5	0
Scire Facias .. .. .	0	5	0
Habeas Corpus ad Testificandum .. .. .	0	5	0



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£ s. d.

**3. Bail Fee.**

For Filing every Bail Piece .. .. .	0	3	0
For every Allowance and Justification of Bail ..	0	3	0
Every Search for Special Bail Piece. See "Searches," No. 10.			
Every <i>Post-terminum</i> on Special Bail Piece filed ..	Nil.		
Office Copy of Special Bail Piece. See "Office Copies," No. 14.			
To a Commissioner for taking Special Bail in the Country .. .. . in each cause	0	2	0

**4. Rule Fee.**

Rule to Plead .. .. .	0	1	0
<i>Note.</i> —No Fee to be taken on any rules to declare, reply, rejoin, or surrejoin, or any Common Rule relating to Pleading, or on Prisoners' Rules.			
All other Common Rules .. .. .	0	1	0
All other Rules, when taken out, whatever be their length .. .. . One Fee on each of	0	4	0

**5. Pleading Fee.**

For the Pleadings, when Issue is joined in Fact or in Law, or both .. .. . One Fee of	0	7	0
<i>Note.</i> —This Fee is to be collected on signing the Writ of Trial, or on passing the Record, or otherwise on the Taxing of Costs.			

**6. Trial Fee.**

For signing the Jury Process and passing and sealing the Record of Nisi Prius .. .. .	0	7	0
For striking and reducing a Special Jury .. .. .	1	1	0
For attending in any other Court, with Documents filed in the office .. .. . the Officer's Expenses.			

**7. Judgment Fee.**

For entering an Interlocutory Judgment, where no Pleading Fee of Seven Shillings has been previously payable .. .. .	0	5	0
For entering a Final Judgment .. .. .	0	7	0
For entering a Judgment of Non Pros .. .. .	0	5	0

	£	s.	d.
For a Certificate of a Judgment. See "Certificate," No. 11.			
For every Satisfaction acknowledged upon Record	0	5	0
For entering an <i>Audita Querela</i> .. .. .	0	5	0
For entering a Certiorari out of Chancery to certify a Record .. .. .	0	5	0
For indorsing the Return on a Writ of Certiorari..	0	3	0
For exemplifying a Record .. .. .	0	5	0
For Searches for Records in the Upper or Inner Treasury. See "Searches," No. 10.			
For Copies, of Records. See "Copies," No. 14.			

## 8. Execution Fee.

For signing and sealing every Writ of Execution ..	0	1	0
For every Commitment in Execution and making Marshal's or Warden's Lists .. .. .	0	3	0

## 9. Error Fee.

For certifying a Record upon a Writ of Error, each roll .. .. .	0	10	0
For drawing and entering every Rule in Error ..	0	4	0
For entry of all Proceedings in Writs of Error ..			Nil.
(Note.—All Entries of Proceedings in Writs of Error are to be prepared by the At- tornies)			
For Office Copies of all Proceedings, when required. See "Office Copies," No. 14.			
For examining the Transcript with the Roll, with the Clerk of the House of Lords. .. ..	1	1	0

## 10. Search Fee.

Every search, other than for Appearances and Rules to plead in the same Term .. .. .	0	0	3
except a single Term. .. .. .	0	0	6
Or a general Search for Judgments, where an Index is kept .. .. .	0	2	6

## 11. Certificate Fee.

For every Certificate .. .. .	0	1	0
For every Certified Copy of an Entry in the Books	0	1	0

# *Officers' Fees.*

15

£ s. d.

## 12. *Affidavit Fee.*

For every Affidavit sworn or affirmed in Court, or before a Commissioner, or in the Master's Office, exclusive of the Usher's Fee, *from each Deponent* 0 1 0

## 13. *Entry, Enrolment, Registration, and Filing Fee.*

For every Entry of an Attorney's Annual Certificate	0	1	0
For every Enrolment or Registration,			
<i>each Deed or Instrument</i>	0	3	0
For filing Bail-piece taken before a Commissioner in the country .. .. .	0	1	0
For filing each Affidavit, except affidavits to hold to Bail and of Service of Process .. ..	0	1	0
For filing the Affidavit and enrolling the Articles previous to the Admission of an Attorney ..	0	5	0
Re-admission .. .. .	0	2	6
For filing Warrants of Attorney or Cognovits, when filed under the stat. 3 Geo. 4, c. 39 .. ..	0	1	0
For filing Orders of Nisi Prius .. .. .	0	1	0
For filing Judge's Orders .. .. .	0	1	0
And for any other Instrument filed by Order of the Court or of a judge .. .. . <i>each</i>	0	1	0

## 14. *Copy, Transcript, or Extract Fee.*

All Office Copies .. .. . <i>per folio</i>	0	0	6
Every other Copy, Transcript or Extract <i>per folio</i>	0	0	6

## 15. *Taxation Fee, References, and Interrogatories.*

For taxing every Bill of Costs .. .. .	0	1	0
If exceeding Three Folios .. .. . <i>per folio</i>	0	0	4
For every Report or Determination of a Master on Special Reference from the Court .. ..	1	1	0
For every Examination vivà voce or on written Interrogatories .. .. .	1	1	0
For settling every Bond as Security for Costs ..	0	10	6
For OUTLAWRY, see " Writs," " Searches," " Enrolments," " Copies."			

## FEEs OF UNDER-USHERS AND CRIERS.

On the taking, adding, or justifying Bail in Court			
<i>each usher</i>	0	0	6

*Officers' Fees.*

	£	s.	d.
For every Oath or Affidavit sworn or Affirmation made in Court, or before a Judge at Westminster in Term time .. .. . each	0	0	1½
For every Person appearing on Recognizance .. .. . each	0	0	6
For Bail taken at Bar (Q. B.) .. .. . each	0	1	0
For an Arraignment at Bar (Q. B.) .. .. . each	0	2	6
For every Fine in Court (Q. B.) .. .. . each	0	0	6
For every Discharge in Court (Q. B.) .. .. . each	0	0	6
For exhibiting Articles of the Peace .. .. . each	0	0	6
For reversing an Outlawry in Civil Cases .. .. . each	0	1	0
For acknowledging a Deed in Court .. .. . each	0	0	3
For a person charged in Execution in Court, or turned over on Habeas Corpus .. .. . each	0	0	1½
For a trial at Bar .. .. . each	0	10	0
Calling and swearing Jury on Do. .. .. . each	0	1	6
Swearing every Witness on Do. .. .. . each	0	0	1½
Attending a Jury on trial at Bar when they withdraw to consider their Verdict .. .. . each	0	1	0
Commission sworn in Court .. .. . each	0	1	0
Estreat delivered on oath in Court .. .. . each	0	1	0
Recognizance taken in Court (except of Bail) .. .. . each	0	2	0
On the Signing of every Final Judgment .. .. . each	0	0	3
For receiving and returning a Record called in Court, for the Officer or Officers producing the same .. .. . each	0	1	0
For Attendance during Argument of any Case in the Crown or Special Paper, or in the Court of Error .. .. .			
One Fee for all the Ushers .. .. .	0	4	0

**COURT KEEPERS' FEES.***In the Exchequer and Common Pleas.*

On the taking, adding, or justifying Bail in Court .. .. .	0	0	4
Every Guardian admitted in Court .. .. .	0	0	4
Every Trial at Bar .. .. .	0	10	0

**TIPSTAFFS' FEES.**

Commitment upon Habeas Corpus at Chambers .. .. .			
One Fee of .. .. .	0	10	6
Renders in Discharge of Bail .. .. .	0	10	6
— in every Action after the first .. .. .	0	6	0
Commitments in Execution by the Court .. .. .	0	10	6
Habeas Corpus to Courts of Queen's Bench, Common Pleas or Exchequer .. .. .	0	10	6

### Officers' Fees.

17

	£	s.	d.
Habeas Corpus to take Witnesses into Court to give Evidence, or for Trial .. .. . <i>per Diem</i>	0	10	6
Habeas Corpus to Chambers to render in other Actions .. .. .	0	10	6
Bankrupts taken before the Commissioners ..	0	10	6
Insolvent Debtors to be heard upon their Petition	0	3	0
Journies with Bankrupts or Insolvents, besides Expenses of Coach Hire or Conveyance, to <i>Principal</i> .. .. . <i>per Diem</i>	1	1	0
and to <i>Assistant</i> , if taken	0	10	6
Prisoners taken into Court by Rule of Court, under the Lords' Act .. .. .	0	10	6
Trial at Bar .. .. . <i>each Tipstaff, per Diem</i>	0	10	6

**JUDGES' CLERKS.**

(WHETHER THE CLERKS OF CHIEF OR OF PUISNE JUDGES.)

### 1. *Summons and Order Fees.*

Summons, each Cause, in Term .. ..	0	1	0
in Vacation .. ..	0	2	0
Summons and Order to try an Issue before the Sheriff .. ..	0	1	0
Order for Writ of Distringas .. ..	0	3	0
Order to hold to Bail, upon Affidavit before suing out a Writ .. ..	0	3	0
Order for Allowance of Bail .. ..	0	3	0
Order to enter up Judgment on an old Warrant of Attorney .. ..	0	4	0
Order to enter Satisfaction upon Do. .. ..	0	3	0
Order to deliver Documents off the File .. ..	0	4	0
Order to sue or defend in forma pauperis .. ..			Nil.
Order for Admission to sue or defend by Guardian .. ..	0	3	4
Order to charge a person, in custody for criminal matter, with an Action .. ..	0	3	0
Order to change the Venue .. ..	0	3	0
Order for amending Record .. ..	0	3	0
Order for a Special Jury .. ..	0	3	0
Order of Reference to Arbitration, from each Party applying for the Order .. ..	0	4	0
Order to compel the Attendance of Witnesses before an Arbitrator .. ..	0	3	0
Order to remand a Prisoner .. ..	0	3	0
Order to remand or discharge a Seaman .. ..	0	3	0
Order to docket Judgment Roll .. ..	0	3	0



	£	s.	d.
Order to file a Certificate of an Acknowledgment of a Deed .. .. .	0	3	0
Order undertaking to pay Debt or Costs, or to pay Attorney's Bill, on Taxation .. .. .	0	3	0
Order to enter Appearance .. .. .	0	3	0
Order to render in Discharge of Bail .. .. .	0	3	0
Order to exonerate Bail .. .. .	0	3	0
Order for Judgment on Writ of Scire Facias .. .. .	0	3	0
Order to make a Rule of Court absolute .. .. .	0	3	0
Order, other than above mentioned .. .. .	0	2	0
Special Commission to take Acknowledgment of a Married Woman .. .. .	0	5	0
Fiat for Admission of Attorney .. .. .	0	10	6
Recognizance to appear and plead .. .. .	0	10	6
Fiat for the Enrolment of a Deed .. .. .	0	2	6
Fiat for Commissions of Sewers .. .. .	0	10	6
Fiat for a Certiorari on the Crown side .. .. .	0	2	0
Fiat for Habeas Corpus on the Crown side .. .. .	0	2	0
Fiat for Habeas Corpus ad testificandum .. .. .	0	2	0
Bond for a Merchant (being a Member of Parliament) and his Sureties, under the Statute .. .. .	0	10	6

*2. Bail Fees.*

Bails on Cepi Corpus in Term or Vacation (out of which 6d. to the Porter of Serjeants' Inn) ..	0	2	6
Do. on Habeas Corpus in a Civil Suit, in Term or Vacation (out of which 6d. to the Porter) ..	0	2	6
Justifying Bail, in Term or Vacation .. ..	0	2	0
Delivering Bail Pieces off the File, to Attorney, for him to take to Westminster .. .. .	0	1	0
Delivering Bail Pieces off the File, which have been filed above a year .. .. .	0	1	0
Bail on Certiorari, in Term or Vacation (out of which 6d. to the Porter) .. .. .	0	2	6
Bail in Error .. .. .	0	2	0
Surrender in discharge of Bail, and Commitment thereon, (out of which 1s. to the Porter) ..	0	7	6
Commitments to the Custody of the Marshal or Warden (out of which 6d. to the Porter) ..	0	3	6
Added Bail .. .. .	0	2	0
Approbation of Commissioners for taking Special Bail .. .. .	0	2	6
Approbation of Commissioners for taking Affidavits .. .. .	0	2	6
Commission for taking Special Bail (including parchment, ingrossing or printing and sealing) .. .. .	1	1	6
Chief Judge's Clerk's Fee .. .. .	1	1	6

# Officers' Fees.

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	£	s.	d.
Commission for taking Affidavits (including parchment, ingrossing or printing and sealing) Chief Judge's Clerk's Fee. .. .. .	1	1	6

## 3. Attendance and Service Fees.

Attendance as Commissioners to take Affidavits ..	0	6	8
Attending to take Interrogatories .. <i>per diem</i>	1	1	0
Attendance at Trial at Bar .. .. <i>per diem</i>	1	1	0
Attendance at the Judge's House, or elsewhere than at Chambers, at the request of a party .. ..	0	6	8
Entry of Caveat .. .. .	0	2	6
Special case for the opinion of the Court .. ..	0	2	6
Special case from Chancery .. .. .	0	5	0
Special Verdict .. .. .	0	2	6
Demurrer and other paper books .. .. .	0	2	0
Exhibit to which Judge's Signature is required ..	0	1	0
Deed acknowledged .. .. .	0	1	0
Deed acknowledged by Married Women .. ..	0	7	6
Second Acknowledgment by Do. .. .. .	0	3	6
Certificate on Nisi Prius Record .. .. .	0	2	6
Certificate of Bail not being put in .. .. .	0	2	6
Copying Judge's Notes .. .. .	0	10	6
Producing Judge's Notes .. .. .	0	2	6
Escape Warrant .. .. .	0	5	0
Warrant to apprehend a bankrupt .. .. .	0	10	6
Attendance by Counsel .. .. <i>each side</i>	0	5	0
Signing a Bill of Exceptions .. .. .	0	5	0
Signing Depositions .. .. .	0	2	0
Certificate on Special case to Courts of Equity ..	0	10	6

## 4. Office Copies.

Office Copies of Interrogatories .. .. <i>per folio</i>	0	0	6
Do. of Depositions .. .. <i>per folio</i>	0	0	6
Do. of Affidavits, if required .. .. <i>per folio</i>	0	0	6

## 5. Affidavits.

For taking Affidavits or Affirmations, from each Deponent, including all Exhibits annexed,			
in Term .. .. .	0	1	0
in Vacation .. .. .	0	2	0
For keeping Affidavits, and carrying them to the Rule office, to be filed .. .. <i>each</i>	0	1	0
Fiat for Allowance of a Writ of Error to the Exchequer Chamber .. .. .	0	6	2
Do. .. .. to Parliament .. .. .	0	12	4

*Office hours.*] In the court of Queen's Bench, by R. T. 7 W. 4, it is ordered that all the offices (the rule office excepted) shall be open, in term time, from eleven in the forenoon till five in the afternoon, and not in the evening; and that the Rule office be open, in term time, from eleven in the forenoon till three in the afternoon, and from six till eight in the evening. In vacation, all the offices shall be open from eleven in the forenoon till three in the afternoon, except between the 10th of August and 24th of October, when they shall be open from eleven in the forenoon till two in the afternoon.

In the court of Common Pleas, by R. T. 7 W. 4, it is ordered, that all the offices (the Secondaries' excepted) be open, in term, from eleven in the forenoon till five in the afternoon; and that the Secondaries' office be open in term from eleven in the forenoon till three in the afternoon, and from six till eight o'clock in the evening. In vacation, all the offices shall be open from eleven in the forenoon till three in the afternoon, except between the 10th of August and 24th of October, when they are to be open from eleven in the forenoon till two in the afternoon only.

In the court of Exchequer, by R. M. 2 W. 4, the Exchequer Office of Pleas shall, during term and one week after, be open from eleven in the forenoon till three in the afternoon, and from six to nine in the evening; and at other times, from eleven in the forenoon till four o'clock in the afternoon, the usual holidays excepted, when the said office is to be closed.

*Holidays in the Offices.*] Formerly there were a great number of holidays, established by stat. 5 & 6 Ed. 6, c. 3, and kept by the different offices of the courts of law at Westminster. But by stat. 3 & 4 W. 4, c. 42, s. 43, none of the days mentioned in the said statute, shall be observed or kept in the said courts, or in the several offices belonging thereto, except Sundays, the day of the nativity of our Lord and the three following days, and Monday and Tuesday in Easter week. And since, by R. G. H. 6 W. 4, reciting this act, it is ordered that in addition to the said days, the following and none other shall be observed or kept as holidays in the several offices belonging to the said courts, *viz.* Good Friday and Easter eve, and such of the five following days as may not fall in the time of term, but not otherwise,—the birthday of our lord the King, the birthday of our lady the Queen, the day of the accession of our lord the King, Whit-Monday and Whit-Tuesday. The stat. 11 G. 4, and 1 W. 4, c. 70, s. 6, which makes the whole of the days between the Thursday before and the Wednesday next after Easter day, holidays in court, if they occur in Easter term, does not extend to the offices; but these days shall not be included in any rules, or notices, or other proceedings, except notices of trial or notices of enquiry. R. G. E. 2 W. 4.

Besides the holidays here expressly named, it is provided by stat. 1 W. 4, c. 7, (which enables the judge, before whom the issue in any action shall be tried, to award speedy execution), that no officer of the said courts shall, for the purpose of taxing costs on any judgment to be signed by virtue of that act, be compelled to attend at any time between the last day of August and the 21st day of October in any year. 1 W. 4, c. 7, s. 6.

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## CHAPTER IV.

### *Sheriffs.*

#### SECTION I.

#### *Sheriffs, their deputies and duties.*

*Sheriffs.*] A sheriff is appointed for each county in England and Wales. There are also certain cities and towns, which are counties of themselves, for which sheriffs are appointed: some have two sheriffs, viz. the cities of Bristol, Chester, Coventry, Gloucester, Lincoln, London, Norwich and York; some only one, viz. the cities of Canterbury, Exeter, Lichfield, Worcester, and the towns of Caermarthen, Haverfordwest, Kingston upon Hull, Newcastle upon Tyne, Nottingham, Poole and Southampton. A sheriff is also appointed for the city of Oxford, although it be not a county of itself. See *Grainger v. Taunton*, 5 Dowl. 190. The sheriffs of London are the same which serve also for Middlesex; but although two individuals actually exercise the office, yet with respect to Middlesex, in contemplation of law, they constitute but one sheriff, and in all writs and other legal proceedings they are named the "sheriff of Middlesex" in the singular number; if named "sheriffs" in the plural, the writ or proceeding would be irregular and bad. *Jackson v. Jackson*, 3 Dowl. 182. We shall treat of the direction of writs to these sheriffs hereafter, in a subsequent part of this work.

*Undersheriffs.*] Sheriffs perform the principal part of their duties by deputy. And by stat. 23 H. 6, c. 9, every sheriff shall appoint such deputy (now called an undersheriff) before he return any writs, to receive all manner of writs and warrants to be delivered to him, under a penalty of 40*l.*, and of treble damages to any person aggrieved by his not doing so. The undersheriff in fact executes all the duties of the sheriff, relating to the execution of writs, the returning of jury process, summoning jurors, executing writs of enquiry, writs of trial, &c.

*Sheriffs' deputies.*] Also, besides the undersheriff, by stat. 3 & 4 W. 4, c. 42, s. 20, "the sheriff of each county in England and Wales, shall severally name a sufficient deputy, who shall be resident or have an office within one mile from the inner temple hall, for the receipt of writs, granting warrants thereon, making returns thereto, and accepting of all rules and orders to be made on or touching the execution of any process or writ to be directed to such sheriff." If he neglect to appoint such a deputy, and a suitor be damnified by his not having done so, he will be liable to an action for the damage sustained. See *Brackenbury v. Laurie*, 3 Dowl. 180.

*Sheriffs' officers.*] The sheriff usually has certain officers under him, commonly called sheriff's officers, for the purpose of executing writs. And as their acts in doing so, often involve the sheriff in a great degree of responsibility, he usually takes from them a bond with sureties in a considerable sum, conditioned to indemnify him from all actions, &c., for for any thing to be done by them; and from their being thus bound, they are often called bound bailiffs.

The sheriff, however, at the request of the party suing out a writ or his attorney, may direct his warrant thereon to any other person, (not being one of his own officers, see *Balson v. Meggot*, 1 Har. & W., 659, 4 Dowl. 557. *Corbet v. Brown*, 6 Dowl. 794), who in that case is termed a special bailiff; but the sheriff in such a case is not liable to the party for any thing that may occur in the execution of the writ; indeed the latter cannot even rule him to return it.

*Duties of sheriffs and their officers.*] Their duties in the execution of writs, we shall consider fully when we come to treat of those writs, and under the title "Arrest." Their duties in the execution of writs of enquiry, in trying causes under writs of trial, and in taking inquisitions upon writs of elegit, we shall treat of under these different heads. And their right to an indemnity, or to a rule of interpleader, shall be treated of under the title "Execution." The other duties of the sheriff or his officers shall also be mentioned under their proper heads, in the course of the work.

## SECTION II.

### *Sheriffs' poundage, and their officers' fees.*

*Sheriffs' poundage.*] Upon executing a *fi. fa.* the sheriff is entitled to 1s. in the pound for the first 100l. of the amount levied, and to 6d. for every pound beyond that. 29 El. c. 4,

and see *R. v. Robinson*, 4 Dowl. 447. Upon executing a *ca. sa.* he is entitled to the like poundage, calculated on the sum indorsed upon the writ. 29 *El. c. 4.* 3 *G. 1, c. 15, s. 17.* And upon executing an *elegit*, or a writ of possession in ejectment, he is entitled to 1*s.* in the pound of the yearly value of the lands extended or recovered, if the yearly value do not exceed 100*l.*, and 6*d.* in the pound beyond that sum. 3 *G. 1, c. 15, s. 16.* And this is not at all affected by the statute as to officers' fees, and the table of those fees, recently established, which shall be mentioned under the next head. *Davies v. Griffith*, 8 *Law, J.*, 70, *ex.*, 7 Dowl. 204.

By stat. 43 *G. 3, c. 46, s. 5*, in every case of execution against the goods of a defendant, the plaintiff may also levy the poundage, fees and other expenses of the execution, over and above the sum recovered by the judgment. This does not extend to execution against the goods of a plaintiff. *Baker v. Sydee*, 7 *Taunt.* 179. And in cases within the act, care must be taken to keep the fees and expenses within such a reasonable sum as will be allowed upon taxation; otherwise the court, on motion, will order the excess to be refunded, with costs to be paid by the defendant. *Bemwell v Oakley*, 2 *Taunt.* 147. See *Rumsey v. Tufnell*, 2 *Bing.* 255. Where the sheriff, having levied under a *fi. fa.* and received the money, was obliged to pay it back upon the judgment and execution being set aside for irregularity, and he did so with the plaintiff's assent: it was holden that this statute did not take away his remedy by action against the plaintiff, for the amount of his poundage. *Rauvstone v. Wilkinson*, 4 *M. & S.* 256.

*Officers' fees.*] The old statutes as to officers' fees are now repealed, and sheriffs' officers hereafter shall demand and take only such fees, &c. as are allowed by the master on taxation: if they demand or receive more, or if any person under pretence of being an officer shall demand or receive greater fees, &c., then, upon complaint thereof to the court, before the last day of the term next following the act complained of, they shall be adjudged guilty of a contempt of the court, and be punished accordingly; and the court may award costs to the party complaining. 1 *Vict. c. 55, s. 1—4.*

The following is a list of the fees now allowed by the masters. And the court on no pretence will allow any fees or expenses not included in it; but such fees or expenses, if paid at all, must be paid by the sheriff out of his poundage. *Slater v. Haines*, 10 *Law J.*, 100, *ex.*

Table of Fees.

	£	s.	d.
For every Warrant which shall be granted by the Sheriff to his Officer upon any Writ or Process :—			
In London and Middlesex .. .. .	0	2	6

	£	s.	d.
And on Crown and Outlawry Process, an additional	0	2	6
In all other Counties where the most distant part			
of the County shall not exceed 100 Miles from			
London .. .. .	0	5	0
Not exceeding 200 Miles .. .. .	0	6	0
Exceeding 200 Miles.. .. .	0	7	0
For an Arrest in London .. .. .	0	10	6
In Middlesex, not exceeding a Mile from the General			
Post Office.. .. .	0	10	6
Not exceeding Seven Miles from the same place ..	1	1	0
In other Counties, not exceeding a mile from the			
Officer's residence .. .. .	0	10	6
Not exceeding Seven Miles .. .. .	1	1	0
Exceeding Seven Miles .. .. .	1	11	6
For conveying the Defendant to Gaol from the Place			
of Arrest .. .. . per mile	0	1	0
For an undertaking to give a Bail Bond .. .. .	0	10	6
Where there are several Defendants in a Writ of			
Capias, and Warrants are issued thereon by the			
Under-sheriff against more than one Defendant,			
no more shall be charged in any case for each			
Warrant, after the first, than .. .. .	0	2	6

*For a Bail Bond.*

If the Debt shall not exceed £50 .. .. .	0	10	6
Do. £100 .. .. .	1	1	0
Do. £150 .. .. .	1	11	6
Do. £300 .. .. .	2	2	0
Do. £400 .. .. .	3	3	0
Do. £500 .. .. .	4	4	0
If it shall exceed £500 .. .. .	5	5	0
For receiving Money under the statute upon De-			
posit for Arrest, and paying the same into Court,			
if in London or Middlesex .. .. .	0	6	8
If in any other County .. .. .	0	10	0

*Bond in Replevin.*

Instead of the allowance of the Fees upon the same			
scale as the Bail Bond, the Fee of One Pound One			
Shilling only is allowed, whatever be the amount,			
if above £20 .. .. .	1	1	0

*For Filing the Bail Bond.*

If the Arrest be made in London or Middlesex ..	0	2	0
If in any other County .. .. .	0	4	0

# *Sheriffs' Fees.*

25

	£	s.	d.
<i>Assignment of Bail or other Bond.</i>			
If in London or Middlesex .. .. .	0	5	0
If in any other County, including postage .. ..	0	7	6
For the return to any Writ of Habeas Corpus, if one Action .. .. .	0	12	0
And for each Action after the first .. .. .	0	2	6
For the Bailiff to conduct Prisoner to Gaol, per diem	0	10	0
And travelling Expenses .. .. . per mile	0	1	0
For searching Offices for Detainers .. .. .	0	1	0
Bailiff's Messenger for that purpose .. .. .	0	2	6
To the Bailiffs, for executing Warrant on Extent, Capias Utlagatum, Levavi Facias, Fieri Facias, Ca. Sa., Ne Exeat, Attachment, Elegit, Writ of Possession, Forfeited Recognizance, Process from Pipe Office, and other like matters, for each, if the distance from the Sheriff's Office, or the Bailiff's residence do not exceed Five Miles ..	1	1	0
If beyond that distance .. .. . per mile	0	0	6
On Distringas in London .. .. .	0	5	0
In Middlesex not exceeding Five Miles from General Post Office .. .. .	0	5	0
In other Counties, not exceeding Five Miles from Officer's Residence .. .. .	0	5	0
Exceeding Five Miles .. .. .	0	10	0
For each Man left in Possession, when absolutely necessary—			
If boarded .. .. . per diem	0	3	6
If not boarded .. .. . per diem	0	5	0
For every Sale by Auction, notwithstanding the Defendant should become Bankrupt or Insolvent, where the Property sold does not produce more than 300 <i>l.</i> 5 per cent.;—480 <i>l.</i> 4 per cent.;—500 <i>l.</i> 3 per cent.; and where it exceeds 500 <i>l.</i> 2½ per cent.			
For the Certificate of Sale to save Auction Duty ..	0	2	6
Bond of Indemnity, besides Stamps .. .. .	1	10	0
Certificate of Execution having issued for Record	0	5	0

## *On Writs of Trial and Inquiry.*

For a Deputation .. .. .	1	1	0
On lodging Writ for entering Cause and Warrant for summoning Jury, which Fee shall be forfeited in case of countermand of Trial .. .. .	0	4	0

## *On Trial or Inquisition.*

Sheriff for presiding .. .. .	1	1	0
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	£	s.	d.
Bailiff for summoning Jury, and attendance in Court	0	4	0
And if held at the Office of the Under-sheriff			
For hire of Room, if actually paid, not exceeding .. .. .	0	10	0
For Travelling Expenses of Under-sheriff from his Office to place where Trial or Inquisition held			
per mile	0	1	0
To the Bailiff, from his residence .. .. .	0	0	6
In all cases in which it shall appear to the Master that a saving of Expense has accrued to the Parties, by reason of a Writ of Trial having been executed by Deputation, the Fee for such Deputation shall be allowed.			
On Writs of Extent, Elegit, Capias Utlagatum, and others of the like nature; for summoning the Jury, use of Room, presiding at the Inquisition, &c. .. .. .	2	2	0
Jury .. .. .	0	12	0
For Travelling Expenses of Under-sheriff from his Office to the place of Inquisition .. .. .	0	1	0
For drawing and engrossing the Inquisition, per folio .. .. .	0	1	6
For a Summons for the attendance of a Witness	0	5	0

*Fees on Writs of Trial and Inquisition.*

The Travelling Expenses of the Under-sheriff from his Office, and of the Bailiff from his Residence, to the place where the Trial or Inquisition is held, are to be apportioned rateably to the parties, if more than one Trial or Inquisition be held at the same time and place.

*In Replevin.*

Bond. See ante, p. 24.			
Precept to Bailiff .. .. .	0	2	6
Notice for Service on Defendant .. .. .	0	2	6
Broker, where the sum demanded and due shall exceed 20 <i>l.</i> , and shall not exceed 50 <i>l.</i> , for Appraisal and Affidavit of value .. .. .	0	10	6
Where it shall exceed 50 <i>l.</i> .. .. .	1	1	0
And his Travelling Expenses from his residence to the place where the Goods are .. .. .	0	0	6
Bailiff for summoning Parties and delivering Goods to tenant .. .. .	1	1	0
And his Travelling Expenses same as Broker.			
For the Warrant, Record, and Return of a Re. fa. lo., Accedas ad Curiam, Pone, or Writ of False Judgment .. .. .	0	16	6

### *Sheriffs' Fees.*

27

	£	s.	d.
For Writ Retorno Habendo . . . . .	0	4	6
For each Summons on a Writ of sci. fa., or for the Service of Writ of Capias where no Arrest . .	0	5	0
And Mileage . . . . . per mile	0	1	0
For recording each Demand or Proclamation under Writs of Outlawry . . . . .	0	2	0
For Bailiff for making each Demand or Proclama- tion on Writs of Outlawry in London and Mid- dlesex . . . . .	0	2	6
In other Counties . . . . .	0	5	0
And Travelling Expenses if the distance shall ex- ceed Five Miles, then for every Mile beyond that distance . . . . .	0	0	6
For any Supersedeas, Writ of Error, Order Liberate or Discharge to any Writ or Process, or for the release of any Defendant in Custody (unless in the Prison of the County), or of Goods taken in Execution . . . . .	0	4	6
For the return of any Writ or Process, and Filing the same, exclusive the Fee paid on Filing . .	0	1	0

### *Jury Process.*

For Return to Common Venire . . . . .	0	3	6
The like to Special . . . . .	0	5	0
The like on Distringas or Habeas Corpus for Com- mon Jury . . . . .	0	12	0
The like for Special Jury . . . . .	0	14	0
The like with a View . . . . .	1	0	0
The like to a Traverse Venire . . . . .	0	14	6
For attendance, naming Special Jury . . . .	2	2	0
Twenty-four Warrants to Summon Special Jury . .	1	4	0
For Bailiff for summoning each Special Juror . .	0	2	0
Sheriff attending in Court . . . . .	1	1	0
For attending a View, the Fees as allowed by Rule of Court, Trinity Term, 7 G. 4, 1826.			
For any Duty not herein provided for, such Sum as one of the Masters of the Courts of King's Bench or Exchequer, or one of the Prothonotaries of the Court of Common Pleas, may upon special application allow.			

### SECTION III.

#### *Proceedings by and against sheriffs.*

*Actions by them.]* As to actions by a sheriff upon a bail bond, see *post*, tit. "*Bail bond.*" The sheriff sues in his own

name, and in his name of office; and in actions on bail bonds, the process must be by writ of summons, as in all other personal actions. If the action be brought by the present sheriff, the writs of execution and other writs in the cause cannot of course be directed to himself, but must be directed to the coroners; *Weston v. Coulson*, 1 W. Bl. 506; if by the late sheriff, they may be directed to the present sheriff.

*Actions against them.*] All actions for a breach of duty in the office of sheriff, may be brought against the high sheriff, although arising from the default of the under-sheriff or sheriff's officer. *Cameron v. Reynolds, Coup.* 403. Even where a sheriff's officer arrested and detained a defendant, under pretence of a warrant, which had been issued on a *fi. fa.* the court held that the defendant might maintain trespass for it against the sheriff. *Smart v. Hutton*, 2 Nev. & M. 426. So, if by the delay of the officer, in selling goods seized by him under a *fi. fa.*, the plaintiff be injured, he may maintain an action against the sheriff. See *Bales v. Wingfield*, 2 Nev. & M. 831. So if a sheriff's officer, under an execution against A., seize and sell the property of B., B. may maintain an action of trespass for it against the sheriff, and recover the value of the goods, and not merely the sum for which they were sold. *Lockley v. Pye*, 10 Law J., 305, *ex.*

So, if the officer, after arresting a defendant, allow him to go at large, without taking a bail bond, an action of escape will lie against the sheriff, if bail above be not put in and perfected. *Fuller v. Prest*, 7 T. R. 109. See *Pariente v. Plumbtree*, 2 B. & P. 35. *Allingham v. Flower*, 2 B. & P. 246. *Birn v. Bond*, 6 Taunt. 554. But no action as for an escape will lie against the sheriff, for his officer keeping the defendant in his custody after the return of the writ, instead of taking him to prison, if the plaintiff have not been delayed or prejudiced in his suit by it. *Plank v. Anderson*, 5 T. R. 37. And it is against the sheriff, in whose time the escape occurred, that the action must be brought, although the officer continue to be the officer of the new sheriff, and the new sheriff have returned the writ. *R. v. Sh. of Middlesex*, 4 East, 604.

So, if the officer take a defendant upon a *ca. sa.* and allow him to go about with the officer's follower, before he takes him to prison, an action for an escape will lie against the sheriff. *Benton v. Sutton*, 1 B. & P. 24. So, where the officer, under a warrant upon a *ca. sa.* not having any clause of *non omittas* in it, entered a franchise and arrested the defendant, and suffered him to go at large without removing him, it was holden that an action for an escape would lie against the sheriff. *Piggott v. Wilkes*, B. & A. 502. Even if the officer allow a party, arrested under a *ca. sa.*, to go at large, upon receiving from him the amount of the debt and costs, it will be

an escape, and an action will lie against the sheriff. *Slackford v. Austin*, 14 East, 468.

The process in actions against the sheriff, is by writ of summons, as in ordinary actions.

*Rule to return a writ of mesne process.*] It is the duty of the sheriff to return the writ of *capias*, immediately after his officer has executed it. 2 W. 4, c. 39, sch. 4. If he do not, the plaintiff may rule him to do so. And he may be thus ruled to return the writ, immediately after he has executed it. The sheriff, however, must be called upon by rule, within six lunar months after the expiration of his office; 20 G. 2, c. 27, s. 2. *R. v. Adderley*, 2 Dug. 463; otherwise no attachment can issue against him for not obeying it, *Yruth v. Hopkins*, 2 Cr. M. & R. 250, even although he was verbally requested to do so before that time. *R. v. Jones*, 2 T. R. 1.

But the sheriff cannot be ruled to return the writ, after the plaintiff has taken an assignment of a valid bail bond, *Williams v. Jacques*, 1 Tidd, 307, and see *Anon.* 2 Chit. 391, or after the parties have compromised the action, see *Alchin v. Wells*, 5 T. R. 470, but see *Balson v. Meggat*, 4 Dowl. 557, cont., or where the writ has been executed by a special bailiff appointed by the plaintiff. *De Moranda v. Dunkin*, 4 T. R. 119. *Hamilton v. Dalziel*, 2 W. Bl. 952. See *Balson v. Meggat*, 4 Dowl. 557. *Harding v. Holden*, 10 Law J., 229, cp. Where the plaintiff obtained the warrant, and sent it to the officer by post, but the letter not being post paid, the officer refused to take it in: the court held that under these circumstances, the plaintiff could not rule the sheriff to return the writ. *Hart v. Weatherley*, 4 Dowl. 171. It may be useful to mention that the defendant may also rule the sheriff to return the writ, if it become necessary for him to do so, as for instance, where upon arrest he deposits a sum of money in lieu of a bail bond, and he afterwards wishes it to be paid into court. *France v. Clarkson*, 2 Dowl. 532.

Where there has been a change of sheriffs since the delivery of the writ, and the writ has been executed by the old sheriff or not at all, care must be taken to rule the late sheriff, and not the present sheriff, to return it, and he must be designated the late sheriff in the rule, otherwise no attachment can be founded upon it; *R. v. Sh. of Cornwall*, 7 Dowl. 600; or if an attachment have issued, the court upon application will set it aside for irregularity. *Thomas v. Neucnam*, 2 Dowl. N. C. 33. *Cassidy v. Stewart*, 3 Man. & Gr. 575.

The rule may be had in term time, upon furnishing the officer who acts as clerk of the rules with the name of the cause, and the sheriff to whom the writ was directed. It is not necessary that there should be any affidavit. *R. G. H. 1 Vict.* And by stat. 2 W. 4, c. 39, s. 15, any judge of the

courts of law at Westminster, in vacation, may make an order for the return of such writ; and such order shall be of the same force and effect as a rule, except that no attachment shall issue for disobedience of it, until it shall have been made a rule of court. And by R. G. M. 3 W. 4, s. 13, "if such order be duly served, but obedience shall not have been paid thereto, and the same shall have been made a rule of court in the term then next following, it shall not be necessary to serve such rule of court, or to make any fresh demand of performance thereon, but an attachment shall issue forthwith for disobedience of such order, whether the thing required by such order shall or shall not be done in the meantime."

The service is usually by delivering a copy of the rule or order to the under-sheriff, or to his clerk at his office, and at the same time showing him the original; or if the sheriff have appointed a deputy in London, a similar service at his office will be sufficient. See 3 & 4 W. 4, c. 42, s. 20. A service of the rule itself, instead of a copy, would not be bad. See *Leaf v. Jones*, 3 Dowl. 315.

The rule, in London and Middlesex, expires in four days after service; R. T. 6 G. 3, K. B.; R. H. 7 G. 3, C. P.; in other counties, &c. it is an eight day rule. R. G. M. 7 W. 4.

Formerly, if the rule expired in vacation, the sheriff had the whole of the vacation to return the writ. But now, by R. G. H. 2 W. 4, s. 11, he must file the writ at the expiration of the rule, or as soon after as the office shall be open.

*Return thereto.*] If the sheriff have been unable to arrest the defendant, he usually returns that he is not found in his bailiwick; where the return was, that he was not "*to be found*," it was holden bad, and the court awarded an attachment against the sheriff. *Key v. MacKynntire*, 5 Dowl. 453. *R. v. Sh. of Kent*, 2 Mees. & W. 316. If he have been unable to execute the writ from any other cause, he returns it specially. A return that the defendant was insane, and could not be taken or removed without danger of his own life and that of the officer, was holden bad, because it did not allege that he continued so until the return of the writ; but if that had been alleged, the court would have received the return, and would not have awarded an attachment. *Cavenagh v. Collet*, 4 B. & A. 279, and see *Pasmore v. Wilkinson*, 3 Dowl. 635. If however the sheriff have taken the defendant, and allowed him to go at large upon giving a bail bond or otherwise, he returns *cepi corpus et paratum habeo*; but this return will not be sufficient, where the sheriff has the defendant in actual custody, *R. v. Sh. of Wilts.* 1 Bing. 423, but the return must show that he is in actual custody, and in what prison. Where the return was, that the sheriff arrested the defendant, but that he rescued himself, and was not afterwards found, it

was objected that it was no return to say that the defendant rescued himself,—but the court held it to be sufficient; it was then objected that it was not said that the defendant was taken within the county, and if he were not, he might lawfully have rescued himself,—and for this defect the return was holden bad. *R. v. Sh. of Middlesex*, 1 B. & A. 190. Where the return stated the defendant to have been rescued out of the custody of the sheriff's bailiff, and not of the sheriff, the court held it to be sufficient. *Gobbey v. Dewes*, 2 Dowl. 747, see *Woodgate v. Knatchbull*, 2 T. R. 155, *cont.* Where the writ was lost, but the sheriff gave notice of it to the plaintiff, and that the defendant was in custody, the court set aside an attachment for not returning the writ, holding that the plaintiff ought to have proceeded as if the sheriff had returned *cepi corpus*. *R. v. Sh. of Kent*, 1 Marsh. 289.

If the return be insufficient, *Wilton v. Chambers*, 1 Har. & W. 582, or if there be no return, the court upon application will grant an attachment against the sheriff; and in the former case, a copy of the return should be annexed to, and verified by, the affidavit, on which the motion is made. *Id.* But if the return be good upon the face of it, but false, the only remedy for the party is by action; the court will not interfere upon motion. *Goubot v. De Crouy*, 2 Dowl. 86. See *Hall v. Jones*, 4 Dowl. 712.

The officer with whom the writ and return is filed, shall indorse on it the day and hour of filing it. *R. G. H. 2 W. 4, s. 12.*

*Rule to bring in the body.*] As soon as the writ is returned, if bail have not been put in, you may obtain a rule, or in vacation a judge's order, requiring the sheriff to bring in the body. And an affidavit is not necessary for this purpose. *R. G. H. 1 Vict.* But if bail have then been put in, you must first except to them, before you obtain the rule or order; otherwise the proceedings will be irregular, *Maycock v. Solymán*, 1 New Rep. 139. *R. v. Sh. of Middlesex*, 7 D. & R. 264. *R. v. Sh. of Middlesex*, 8 T. R. 258. *R. v. Sh. of London*, 5 Dowl. 387. This rule or order may in all cases be obtained on the day next after the writ has been returned, or on the same day, *Pouchee v. Lieven*, 4 M. & S. 427, if the time for putting in bail have then expired. *Rolfe v. Steele*, 2 H. Bl. 276. *R. v. Sh. of Middlesex*, 8 East, 525. *Hutchins v. Hird*, 5 T. R. 479. *Gore v. Williams*, 3 Anst. 653. If the bail have already justified, or if they have been put in twenty days and have not been excepted to, of course no body rule or order can regularly be sued out. So, after the defendant was superseded for want of declaration, it was holden that the sheriff could not be ruled to bring in the body. *Jones v. Lander*, 6 T. R. 753. So, after the plaintiff had recovered against the sheriff in an action for an escape of the defendant, the court held that he could not rule the sheriff

to bring in the body. *Barwick v. Walton*, 2 B. & A. 623. So, after the defendant was discharged by order of the plaintiff, it was holden that the sheriff could not be ruled to bring in the body, although the plaintiff had previously assigned the debt, and the sheriff had notice of it. *Hookham v. Monkton*, 6 Moore, 497. So, by taking a warrant of attorney or cognovit from the defendant, payable by instalments, the plaintiff discharges the sheriff. *Brown v. Neave*, 11 Wightw. 121. *R. v. Sh. of Surrey*, 1 Taunt. 159. And the rule to bring in the body, must also be taken out within a reasonable time, otherwise the court upon application will set it aside, although the delay has been occasioned by listening to proposals from the defendant. *R. v. Sheriff of London*, 1 Taunt. 111. So, where it might have been served on the first day of Hilary term, but was not in fact served until the first day of Easter term, owing to a negotiation between the plaintiff and the defendant, it was holden that the sheriff was thereby discharged, and an attachment which had been obtained against him was set aside. *R. v. Sh. of Middlesex*, 1 Dowl. 53. But if a sheriff return *cepi corpus*, he may afterwards be ruled to bring in the body, although he be out of office at the time. *R. T. 31 G. 3, K. B.* So, merely consenting to an order for staying proceedings on payment of debt and costs, *R. v. Sh. of Middlesex*, 2 Bing. 366, or time being given to add and justify another bail instead of one rejected, *R. v. Sh. of London*, 1 D. & R. 163, or the plaintiff declaring in the action, now that the *capias* is no longer process in it, *R. v. Sh. of Montgomeryshire*, 1 Dowl. N.C. 388, will not have the effect of discharging the sheriff.

Formerly the body rule could not be drawn up in vacation. But now, by R. G. H. 3 W. 4, "in case a rule of court or judge's order for returning a bailable *capias* shall expire in vacation, and the sheriff or other officer having the return of such writ shall return *cepi corpus* thereon" [or if the sheriff return *cepi corpus* without any rule or order, *Bertram v. Davis*, 6 Dowl. 180,] "a judge's order may thereupon issue, requiring the sheriff or other officer, within the like number of days after service as by the practice of the court is prescribed with respect to rules to bring in the body issued in term, to bring the defendant into court, by forthwith putting in and perfecting bail; and if the sheriff or other officer shall not duly obey such order, and the same shall have been made a rule of court in the term next following, it shall not be necessary to serve such rule of court, or to make any fresh demand thereon, but an attachment shall issue forthwith for disobedience of such order, whether bail shall or shall not have been put in and perfected in the mean time." In term time the rule is obtained in the same manner as the rule to return the writ; see *ante*, p. 29; and the rule or order is served in the manner mentioned, *ante*, p. 30.

This rule is a four day rule in London and Middlesex; *R. T. 6 G. 3, K. B.*; *R. H. 7 G. 3, C. P.*; an eight day rule in other counties, &c. *R. G. M. 7 W. 4.*

*Rule to return a writ of execution.*] At any time whilst the sheriff, to whom a writ of execution has been directed, is in office, or within six months after he goes out of office, he may be ruled or ordered to return the writ, at the instance either of the plaintiff or defendant; but not afterwards, see *Yrath v. Hopkins*, 2 Cr. M. & R. 250, 1 Gale, 141, 3 Dowl. 711. *Thomas v. Neucnam*, 2 Dowl. N.C. 33, unless under very particular circumstances. See *Wilton v. Chambers*, 3 Dowl. 333. And where the rule was served on the under-sheriff of the new sheriff within the six months, but not on the under-sheriff of the late sheriff until after the six months had expired, the court held that the plaintiff could not have an attachment against the late sheriff for not returning the writ. *Yrath v. Hopkins*, 2 Cr. M. & R. 250, 3 Dowl. 711. It has been holden that a defendant may rule the sheriff to return the writ, whether the goods seized were sold to others, or redeemed by himself; or although he paid the debt, &c. after the sheriff had kept possession for a considerable time, at his desire, to enable him to pay, without resorting to a sale; *Edmunds v. Watson*, 7 Taunt. 5, 3 Marsh. 330; but he must in general show some special ground for requiring it. See *Williams v. Webb*, 12 Law J., 137 cp. The court, however, have set aside the rule to return a writ of *fi. fa.* which had been sued out after the parties had compromised the action. *Alchin v. Wells*, 5 T. R. 470. *Hodges v. Jordan*, 5 Dowl. 6. So where delay had been occasioned by a negotiation between the plaintiff's attorney and the sheriff's officer, in consequence of which the goods were seized under an extent, the court set aside a *distringas nuper vicecomitem* sued out by the plaintiff. *Ruston v. Hatfield*, 3 B. & A. 204. So, where the *fi. fa.* had been executed by a special bailiff appointed by the plaintiff, the court refused a rule upon the sheriff to return the writ, even although required merely for the purpose of enabling the plaintiff to sue out a *ca. sa.*, except upon the terms of paying the sheriff's costs, and undertaking not to bring any action. *Harding v. Holden*, 10 Law J., 229, cp. The party who sued out the writ, may move for a return of it, as a matter of course. But where a mandate on a *ca. sa.* issued to the bailiff of a liberty to arrest a defendant, and the defendant was afterwards discharged, under the Insolvent Act, out of the custody of the sheriff, and the plaintiff became his assignee: the court held that the plaintiff was estopped from ruling the bailiff to return the mandate. *Hepworth v. Sanderson*, 8 Bing. 19. So, where a plaintiff ruled the sheriff to return the writ, and the bailiff of a franchise within the county to return the sheriff's mandate, (as is usual in practice), and the sheriff returned *cepi corpus*, but the



bailiff made no return,—the fact being that the sheriff had directed his mandate to the bailiff, who arrested the defendant, and handed him over to the custody of the sheriff: the plaintiff having brought an action against the bailiff for an escape, an application was made to discharge the rule to return the mandate; and Coleridge, J., held that as the sheriff had returned *cepi corpus*, the plaintiff had no right to call upon the bailiff to return the mandate, and discharged the rule accordingly. *Jackson v. Taylor*, 2 Har. & W. 135, 5 Dowl. 140. See *Platel v. Dore*, 4 Bing. N. C. 204.

In London and Middlesex, the rule expires in four days. In all other counties, &c., it is an eight day rule. *R. G. M.* 7 W. 4. If it expire in vacation, "the sheriff shall file the writ at the expiration of the rule, or as soon after as the office shall be open." *R. G. H.* 2 W. 4, s. 11. See *R. v. Sh. of Surrey*, 3 Dowl. 82. If it expire on the last day of term, the plaintiff may move for an attachment at the rising of the court on that day, if the writ be not returned. *R. v. Sh. of Surrey*, 11 East, 591. If from circumstances a further time be requisite, to enable the sheriff to make a return to the writ, the court will in general grant it; see *Wells v. Pickman*, 7 T. R. 174; provided the case be not such as to enable the sheriff to obtain relief under the Interpleader Act. *Vide post*.

As writs of execution may now be tested in vacation, and returnable *immediatè*, a judge's order may now be obtained in vacation, requiring the sheriff to return them, and an attachment may be obtained for disobedience of such order, see *Howitt v. Rickaby*, 9 Mees. & W. 52, in precisely the same manner as with respect to a writ of *capias*, as mentioned *ante*, p. 29, the stat. 2 W. 4, c. 59, s. 15, and *R. G. M.* 3 W. 4, s. 13, there stated, extending as well to the writs of *ca. sa.*, *fi. fa.*, and *elegit*, as to the ordinary writ of *capias*. See *R. v. Sheriff of Surrey*, 3 Dowl. 82. They have also been holden to extend to the writ of *venditioni exponas*. *R. v. Sh. of Berkshire*, 8 Dowl. 97. *Hughes v. Rees*, 7 Id. 56. But they do not extend to cases, where the order, if obtained, must require the return to be made in term time, but the party in such cases must proceed by ruling the sheriff, as in ordinary cases. *Williamson v. Harrison*, 9 Mees. & W. 225.

The court, where it is necessary, will enlarge the time given by the rule to return a writ of execution. Where, for instance, the defendant was arrested and in custody under a *ca. sa.*, but was too ill to be removed, and the plaintiff ruled the sheriff to return the writ: the court, on the application of the sheriff, enlarged the time for making the return, but refused to make the plaintiff pay the extra cost of keeping the defendant in custody until he could be removed. *Jones v. Robinson*, 12 Law J. 415 *ex.*, 2 Dowl. N. C. 1044.

The sheriff's return to a *fi. fa.* is general, that he has seized goods to a certain amount, without specifying what goods, or

that the defendant has no goods within his bailiwick; see *Munk v. Cass*, 9 *Dowl.* 332; and where a defendant moved that the sheriff should amend his return by specifying the particular articles seized and sold, the court refused to order it, nothing criminal being imputed to the sheriff or his officer. *Willett v. Sparrow*, 6 *Taunt.* 576.

*Attachment for not returning a writ or not bringing in the body.*] The sheriff shall return a writ, on the day on which the rule for returning the same shall expire; otherwise the plaintiff shall be at liberty to move for an attachment on the next day. *R. M.* 32 *G.* 3, *K. B.* So, if a judge's order to return the writ have been served in vacation, and the sheriff have not obeyed it, you may, in the term next after the time given by the order, move to make the order a rule of court, and for an attachment; and it will be no answer to say that the sheriff has returned the writ, after the expiration of the order and before the attachment was moved for, *See R. G. M.* 3 *W.* 4, s. 13, *ante*, pp. 29, 30. *Vide infra*, or that the plaintiff, instead of forthwith applying for the attachment, desired the sheriff to proceed with the execution. *Houitt v. Rickaby*, 9 *Mees. & W.* 52.

If the rule to return the writ expire in vacation, the sheriff must file the writ "at the expiration of the rule, or as soon after as the office shall be open," *R. G. H.* 2 *W.* 4, s. 11, and he has not, as formerly, until the first day of the following term to do so. If he fail to obey the rule, the court, it should seem, would grant an attachment against him on the first day of the next term, even although they may have returned the writ in the mean time and before the attachment is moved for, particularly if it appear that the plaintiff has been delayed or prejudiced in his proceedings by the sheriff's laches.

As to the attachment for not bringing in the body: if at the expiration of the rule, bail have not been perfected, and the rule of allowance actually served, *R. v. Sheriff of Middlesex*, 4 *T. R.* 493, and if the defendant have not been rendered, the plaintiff may move for an attachment on the next day. When the rule expires on the last day of term, you may move for the attachment at the rising of the court on that day. *R. T.* 38 *G.* 3, r. 2, *R. v. Sh. of Surrey*, 11 *East*, 591, *but see R. v. Sh. of Middlesex*, 8 *T. R.* 464. So, where a further time is given to justify, if the bail do not justify on the morning of the day given, the plaintiff, if the body rule have expired, may move for an attachment on the same day. *Thompson's bail*, 1 *Chit.* 356, and *see R. v. Sh. of Middlesex*, 8 *D. & R.* 137. *R. v. Sh. of London*, 1 *Chit.* 567. *R. v. Sh. of Middlesex*, 6 *Dowl.* 164, 3 *Mees. & W.* 64. And care must be taken to move for it, sue it out, and prosecute it, without delay. Where the body rule expired in Michaelmas term, and the attachment was not moved for until Easter, the court on ap-

plication set aside the attachment. 3 B. & P. 151. So, where the rule for the attachment was obtained on the 11th of February, but the plaintiff did not issue it until the 3rd of May, and in the intermediate time the defendant became bankrupt, the court on application set aside the attachment. *R. v. Sh. of Surrey*, 9 East, 467. In all cases, however, (except where a judge's order to bring in the body is made in vacation,) if bail be justified, and the rule of allowance served, or if the defendant be rendered and notice of render given, at any time before the attachment is moved for, the attachment cannot afterwards issue. *Thorold v. Fisher*, 1 H. Bl. 9; *R. v. Sh. of Middlesex*, 2 M. & S. 562. *Weddell v. Berger*, 1 B. & P. 325. *R. v. Sh. of Middlesex*, 2 D. & R. 225. *R. v. Sh. of Middlesex*, 2 Smith, 243. *Morley v. Cole*, 1 Price, 103. See *Vanderhaden v. Britten*, 4 D. & R. 155. But if the plaintiff have been at expense in giving instructions to move for the attachment, the court will order those costs to be paid. *Jarrett v. Cressy*, 3 B. & P. 603. *R. v. Sh. of Middlesex*, 1 Taunt. 56. Where bail justified on the same morning the attachment was moved for, the court set it aside on payment of costs. *Turner v. Bristow*, 2 B. & P. 38. It may be necessary to mention that the court will grant the attachment, although the sheriff at the time be out of office. *Meekins v. Smith*, 1 H. Bl. 629.

If a judge's order to bring in the body be served in vacation, as mentioned *ante* p. 29, and bail be not perfected, (whether excepted to or not, *R. v. Sh. of Middlesex*, 4 Mees. & W. 529,) or the defendant rendered, on or before the day mentioned in the order, you may, on any day in the term next after the time given by the order, move the court to make the order a rule of court and for an attachment; *R. G. H. 3 IV. 4*, *ante*, p. 30; and it will be no answer to say that the body rule has since, and before moving for the attachment, been complied with. In the Exchequer, in such a case, the order is made a rule of court, and the attachment granted, upon one motion. *Howell v. Bulteel*, 2 Cr. & M. 339. *Foster v. Kirkwall*, 4 Dowl. 370. In the Common Pleas there must be separate motions for each, one to make the order a rule of court, and then a separate motion for the attachment. *Pilcher v. Woods*, 4 Dowl. 329. In the Queen's Bench, Littledale J., in one case held that there should be separate motions; *Stainland v. Ogle*, 3 Dowl. 99; but Coleridge J., afterwards allowed one motion for both, as in the Exchequer. *Hinchliffe v. Jones*, 4 Dowl. 86.

It is a remarkable circumstance, that there is no provision in the new statutes or rules, respecting a rule to bring in the body expiring in vacation. An attachment cannot of course be moved for any disobedience of it, until the following term; and it is doubtful whether a justification of bail or render in the meantime would not be an answer to an application for it.

It may be prudent, therefore, until there shall be some decision upon the subject, not to rule the sheriff to bring in the body so late in the term, that the rule must expire in the vacation; but it is better to wait until the vacation, and then obtain a judge's order to return the writ and bring in the body, as directed *ante*, pp. 29, 32.

And lastly, as to an attachment for not returning a writ of execution: if when ruled to return the writ, the sheriff fail to do so within the time limited for that purpose, the court will grant an attachment against him. And the plaintiff does not waive his right to the attachment, by afterwards directing the sheriff to proceed with the execution. *Howitt v. Rickaby*, 9 Mees. & W. 52, 1 Dowl. N. C. 389. Or if he make a bad return, the court will quash it, and grant an attachment; but upon an application for this latter purpose, the return must be brought before the court in a manner properly authenticated, as by an office copy, or examined copy verified by affidavit. *Wilton v. Chambers*, 1 Har. & W. 582, 5 Nev. & M. 431. In what cases the court will allow the return to be amended, see *post*, title "*Amendment*." Where a plaintiff's attorney, after levying an execution on the goods of the defendant at the plaintiff's suit, ceased to act for him, and became the attorney for the defendant—he then procured the under-sheriff to return a larger sum as levied under the *fi. fa.* and paid over to the plaintiff, than was the fact: the court ordered the writ to be taken off the file, and the return to be amended according to the truth. *Green v. Glasbrook*, 2 Bing. N. C. 143. 1 Hodg. 193.

The affidavit, on which you move for the attachment, must state a service of the rule or order annexed, upon the under-sheriff or sheriff's deputy, either personally, or upon one of his clerks in his office, see *Harmer v. Tilt*, 2 Marsh. 251, and that the original rule or order was at the same time shown to him. *Barnard v. Berger*, 1 New Rep. 121. Where the attachment is for not returning the writ, the affidavit then proceeds to state a search for the writ and that it has not been returned; if for not bringing in the body, it states either that no bail above have been put in for the defendant, or that bail have been put in, but the same have not been perfected. See the forms in the Appendix.

Draw up the rule for the attachment. In the Common Pleas and Exchequer, get a blank form of the writ on parchment, and fill it up; if it be against the present sheriff, direct it to the coroners; or if the coroner be the adverse party, then to elisors; (*R. v. Sheriff of Glamorganshire*, 1 Dowl. N. C. 308;) if against the late sheriff, direct it to the present sheriff; get it signed and sealed, for which the rule will be the officer's warrant. Then leave it, together with your bill of costs, at the office of the coroner or sheriff to whom it is directed, to be exe-

cuted. In the Queen's Bench, the writ is made out by one of the clerks at the crown office, and signed there. At the return of the writ, call at the office of the coroner, &c. and if he have got the money from the sheriff, he will pay it to you; if not, rule him to return the writ; and if he do not return it, move for an attachment against him; but if he have returned that he has taken the body of the sheriff, then move for a habeas corpus to bring in the body. In the Queen's Bench, these rules are obtained at the crown office. Upon some one of these proceedings, the money will be paid to you.

The sheriff's liability, upon a *capias*, is not restricted to the sum indorsed on the writ, but he is liable for the whole amount actually due, and costs, *R. v. Sh. of London*, 9 East, 316. *Heppel v. King*, 7 T. R. 370. *Fould v. Macintosh*, 1 H. Bl. 233, to the extent of the penalty in the bail bond. *R. v. Sh. of Middlesex*, 3 East, 604. In an action against the acceptor of a bill of exchange, the sheriff, if in contempt, may stay the proceedings against him, upon payment of the debt and the costs in that action, even although an action against the drawer be also pending. *Vaughan v. Harris*, 3 Mees. & W. 542. *Ball v. Blackwood*, 6 Dowl. 589.

*Attachment, when and on what terms set aside.*] If any of the previous proceedings in the action, to compel the defendant or sheriff to put in and perfect bail, be irregular, the court will set aside the attachment for not bringing in the body. Thus, where the rule to bring in the body was sued out, before the time for putting in bail had expired, *Rolfe v. Steele*, 2 H. Bl. 276,—where although notice of exception was given, no exception was actually entered, *Rogers v. Mapleback*, 1 H. Bl. 106,—where notice of exception was given, but not in writing, *Cohn v. Davies*, 1 H. Bl. 80,—and where the notice of exception was not intitled in the cause, *R. v. Sh. of Middlesex*, 1 Chit. 741,—where the order in vacation to bring in the body, was upon the sheriff, instead of the late sheriff, *R. v. Sh. of Cornwall*, 7 Dowl. 600,—in these cases the court set aside the attachment. So, where the plaintiff allowed an unreasonable time to elapse after the return of the writ, before he sued out the body rule, the court set aside an attachment obtained for not obeying the latter rule. *R. v. Sh. of Surrey*, 7 T. R. 452. And where the rule for the attachment for not bringing in the body was obtained on the 11th of February, but the attachment not sued out till the 3rd of May, and in the mean time (on the 19th of March) the defendant had become bankrupt, and the sheriff had lost his opportunity of paying the debt and proving for it on the estate: the court set aside the attachment. *R. v. Sh. of Surrey*, 9 East, 467. So, where the rule for the attachment was obtained on the 19th of November, and the attachment not sued out and served on the

sheriff until the 9th of March following, the court set aside the attachment. *R. v. Perring*, 3 B. & P. 151. But where the plaintiff forbore to enforce the attachment for ten days, at the instance of the sheriff's officer, the court refused to set aside the writ, although the indulgence was given without the consent of the sheriff. *R. v. Sh. of London*, 1 Taunt. 489. So where the plaintiff stayed the proceedings for a month, at the instance of the defendant and one of the bail, the court refused to set aside the attachment upon the application of the bail. *R. v. Sh. of Middlesex*, 1 D. & R. 388. The court have also refused to set aside an attachment, merely on the ground of the defendant having died after the body rule expired, *R. v. Sh. of Middlesex*, 3 T. R. 133, or of the defendant having escaped; *Ibbotson v. Tindall*, 1 Bing. 156; but they set aside the attachment, and with costs, where it appeared that the defendant had been rescued out of the custody of the sheriff, and the plaintiff had prevented his being retaken. *R. v. Sh. of Middlesex*, 1 B. & A. 192. See also other cases mentioned, ante, p. 35.

The court will set aside a regular attachment for not returning the writ, upon payment of costs; see *R. v. Sh. of Essex*, 1 M. & W. 720; and they have done so, even where the sheriff had taken a bail bond with one surety only. *R. v. Sh. of Surrey*, 1 Gale, 319, 2 Cr. M. & R. 689. So, where an attachment issues for not returning a writ of execution, the court will generally set it aside, on payment of costs, if the creditor have not been damnified by the delay. *R. v. Sh. of Essex*, 8 Dowl. 5.

The court will also set aside a regular attachment for not bringing in the body, in ordinary cases, upon payment of costs merely. But before the application is made, bail must be put in and perfected, *R. v. Sh. of Middlesex*, 2 Dowl. 116, or the defendant rendered; see *R. v. Sh. of Middlesex*, 4 Dowl. 673. *R. v. Sh. of Lincolnshire*, 2 Cr. M. & R. 656; even where it appeared that the bail had justified, but the rule of allowance was not served, the court discharged the rule nisi with costs. *R. v. Sh. of Middlesex*, 2 Dowl. 116. But the court will not entertain the application, if the sheriff have not taken a bail bond, whether the application be made on the part of the defendant, *R. v. Sh. of London*, 2 B. & A. 354; *Turnbull v. Moreton*, 1 Chit. 721, or of the sheriff, *Burn v. Sh. of Middlesex*, 2 Marsh. 261. *Collins v. Snuggs*, 6 Moore, 111. *Vanderhagen v. Britten*, 4 D. & R. 155, or if merely an undertaking have been given, instead of a bail bond, without the consent of the plaintiff. *Fuller v. Prest*, 7 T. R. 109. So, if a bail bond have been taken, but it be executed by one surety only, the court will not set aside the attachment upon the application of the sheriff or his officer; *R. v. Sh. of London*, 2 Bing. 227; but they will, at the instance of the bail, *R. v. Sh. of Middlesex*, 2 Dowl. 140, or even at the instance of the

sheriff or his officer, where the attachment is merely for not returning the writ. *R. v. Sh. of Surrey*, 1 Gale, 319. Where the attachment is for not obeying a judge's order to bring in the body in vacation, rendering the defendant after the time limited by the order, although before the attachment is actually moved for, will not purge the contempt, or prevent the attachment from issuing; but the court in such a case will set aside the attachment upon payment of costs, *R. v. Sh. of Middlesex*, 2 Dowl. 432, 2 Nev. & M. 674, or even without costs, if the plaintiff have been guilty of delay in applying for the attachment. *R. v. Sh. of Middlesex*, 5 Dowl. 245.

The affidavit on which the motion is made, is the same as that adopted upon setting aside regular proceedings upon a bail bond; see *post*, title "*Bail bond*;" except, that instead of stating that an assignment of the bail bond has been taken, you state that "*on — last, an attachment issued out of this honourable court, against the said sheriff of —, for not having obeyed the rule to bring in the body of —, as this deponent hath heard and verily believes.*" See as to the affidavits of merits, *Pringle v. Marsack*, 1 D. & R. 155. *Bell v. Taylor*, 1 Chit. 572. *R. v. Sh. of Lincolnshire*, 4 Dowl. 455; as to an affidavit by the bail; *R. v. Sh. of London*, 4 Bing. 427. *R. v. Sh. of Middlesex*, 1 Chit. 347, 721, 722. *R. v. Sh. of Middlesex*, 3 Dowl. 186. *Call v. Thelwell*, Id. 444, 443; or on behalf of the sheriff or his officer; *R. v. Sh. of Surrey*, 1 Cr. M. & R. 581; and see the rules of the Queen's Bench and Exchequer upon the subject, *post*, title "*Bail bond*." The affidavit must be intituled "*The Queen v. The Sheriff of —;*" *R. v. Sh. of Middlesex*, 7 T. R. 439. *R. v. Sh. of Middlesex*, 5 B. & C. 389. *R. v. Sh. of Middlesex*, 2 Mees. & W. 107; and it is usual also to name the cause.

If the plaintiff have been prevented from entering his cause for trial, by the defendant not having perfected his bail in due time, the court, in staying proceedings against the sheriff, will order the attachment to stand as security, in precisely the same cases that they will order the bail bond to stand as a security, in staying proceedings upon a bail bond. See *post*, tit. "*Bail bond*;" and see *R. v. Sh. of Essex*, 2 Dowl. 648. *Call v. Thelwell*, 3 Dowl. 445, 443. *Casley v. Binns*, 2 Mees. & W. 285. Where the question is whether the attachment shall stand as a security or not, it is for the plaintiff to show by his affidavit the facts necessary to prove that he has lost a trial, such as the time of delivery of the declaration, &c. *R. v. Sh. of Surrey*, 5 Taunt. 606. Where the attachment was ordered to stand as a security in Michaelmas term, and the sheriff, who had previous notice of the attachment, applied in Hilary term to discharge that part of the rule which required the attachment to stand as a security, urging that he was no party to the rule: the court held his application to be too late. *Lee v. Cary*, 1 Chit. 180.

So, if an attachment issue for not returning a *ca. sa., fi. fa. venditioni exponas*, &c., and no special damage have arisen from the delay, the court will in general set it aside upon payment of costs, and making the return, even although the attachment be regular. And therefore where an attachment issued against the sheriff, for not returning a writ of *venditioni exponas*, the court set it aside on payment of costs, and on paying to the plaintiff the balance in the sheriff's hands, after payment of previous executions, and the expenses, &c., such balance being all that the plaintiff was fairly entitled to. *R. v. Sheriff of Herts*, 9 Dowl. 916.

## CHAPTER V.

### Attornies.

#### SECTION I.

#### Articled clerks.

##### 1. Binding and service.

*In what cases.*] No person shall act as an attorney, unless he have been admitted and enrolled as such (a); and no person shall be admitted or enrolled as an attorney, unless he shall

(a) By stat. 6 & 7 Vict. c. 73, s. 2, no person shall act as an attorney or solicitor, or as such attorney or solicitor sue out any writ or process, or commence, carry on, solicit, or defend any action, suit, or other proceeding, in the name of any other person or in his own name, in Her Majesty's high court of Chancery, or courts of Queen's Bench, Common Pleas, or Exchequer, or court of the duchy of Lancaster, or court of the duchy chamber of Lancaster at Westminster, or in any of the courts of the counties palatine of Lancaster and Durham, or in the court of bankruptcy, or in the court for the relief of insolvent debtors, or in any county court, or in any court of civil or criminal jurisdiction, or in any other court of law or equity in that part of the United Kingdom of Great Britain and Ireland called England and Wales,—or act as an attorney or solicitor in any cause, matter, or suit, civil or criminal, to be heard,

tried, or determined before any justice of assize, of oyer and terminer, or gaol delivery, or at any general or quarter sessions of the peace for any county, riding, division, liberty, city, borough, or place, or before any justice or justices, or before any commissioners of Her Majesty's revenue,—unless such person shall have been, previously to the passing of this act, admitted and enrolled and otherwise duly qualified to act as an attorney or solicitor under or by virtue of the laws now in force, or unless such person shall, after the passing of this act, be admitted and enrolled and otherwise duly qualified to act as an attorney or solicitor, pursuant to the directions and regulations of this act, and unless such person shall continue to be so duly qualified and on the roll at the time of his acting in the capacity of an attorney or solicitor as aforesaid. 6 & 7 V. c. 73, s. 2.



have been bound to serve as a clerk to a practising attorney for five years, and duly served that time (b), or three years if he have had a degree of bachelor of arts or bachelor of laws at one of the Universities (c).

*Who may take.*] Every practising attorney may take clerks (d); provided he be not himself a clerk to some other attorney (e). And each attorney may have two at the same time

(b) No person shall, from and after the passing of this act, be capable of being admitted and enrolled as an attorney or solicitor, unless such person shall have been bound by contract in writing to serve as clerk, for and during the term of five years, to a practising attorney or solicitor in England or Wales, and shall have duly served under such contract for and during the said term of five years, and also unless such person shall, after the expiration of the said term of five years, have been examined and sworn in the manner hereinafter directed. *Id.* s. 3.

(c) But any person who shall have taken, or who shall take, the degree of bachelor of arts within six years after his matriculation, or the degree of bachelor of laws within eight years after his matriculation, either in the university of Oxford or in the university of Cambridge, or in the university of Dublin, or in the university of Durham, or in the university of London, and who shall within four years after the day whereon he shall have taken or shall take such degree be bound by contract in writing to serve as a clerk, for and during the term of three years, to a practising attorney or solicitor in England or Wales, and shall have continued in such service for and during the said term of three years, and shall during the whole of such term have been actually employed by such attorney or solicitor, or by the London agent of such attorney or solicitor with his consent for any part of the said term not exceeding one year, in the proper business, practice, or employment of an attorney or solicitor, and who shall after the expiration of the said term of three years have been examined and sworn in the manner herein-after directed,—shall be

capable of being admitted and enrolled as an attorney or solicitor, although he shall have served a clerkship under such contract as aforesaid for and during the term of three years only. *Id.* s. 7.

It is provided, however, that nothing in this act contained shall extend or be construed to extend to the examination, swearing, admission, or enrolment of the clerks of the petty bag office or of the clerks of the Queen's coroner and attorney in the court of Queen's Bench for the time being, but that the said clerks respectively shall and may be examined, sworn, admitted, and practise in their respective courts and offices, in like manner as they might have been or done before the making of this act. *Id.* s. 46.

And it is also provided, that this act or any thing herein contained shall not extend or be construed to extend to the examination, swearing, admission, or enrolment, or any rights or privileges of any persons appointed to be solicitors of the treasury, customs, excise, post office, stamp duties, or any other branch of Her Majesty's revenue, or to the solicitor of the city of London, or to the assistant of the council for the affairs of the admiralty or navy, or to the solicitor to the board of ordnance. *Id.* s. 47.

(d) See sect. 3, *supra*.

(e) No attorney or solicitor shall have more than two clerks at one and the same time, who shall be bound by such contract in writing as aforesaid to serve him as clerks; and that no attorney or solicitor shall take, have, or retain any clerk who shall be bound by contract in writing as aforesaid, after such attorney or solicitor shall have discontinued or left off practising as or carrying on the business of an attorney or solicitor, nor whilst such attorney

(f). But attorneys in partnership may have two each. Where an attorney of the court of Queen's Bench, with a view to secure the business arising from the prisoners in the King's Bench prison, and by mere collusion, took one of the turnkeys as an articulated clerk: the court ordered the articles to be cancelled. *Frazer's case*, 1 Burr. 291.

*The articles.*] Engross the articles upon a 120l. stamp; and a counterpart, if required, on a 1l. 15s. stamp; and let them be executed. The articles must be stamped, before they are engrossed. 34 G. 3, c. 14, ss. 10, 11.

Within six months after the execution of the articles, let an affidavit be made by the master, (see the form in the Appendix,) and filed with the proper officer (g), stating the execution of the articles, and that he himself has been duly admitted an attorney (h). Pay for filing, 5s. No stamp is now

or solicitor shall be retained or employed as a writer or clerk by any other attorney or solicitor; and service by any clerk under articles to an attorney or solicitor, for and during any part of the time that such attorney or solicitor shall be so employed as writer or clerk by any other attorney or solicitor, shall not be deemed or accounted as good service under such articles. *Id.* s. 4.

(f) *Id.* *ibid.*

(g) See sect. 20, *post*, p. 54.

(h) Whenever any person shall after the passing of this act be bound by contract in writing to serve as a clerk to any attorney or solicitor as aforesaid, the attorney or solicitor to whom such person shall be so bound as aforesaid shall, within six months after the date of every such contract, make and duly swear, or cause or procure to be made and duly sworn, an affidavit or affidavits of such attorney or solicitor having been duly admitted, and also of the actual execution of every such contract by him the said attorney or solicitor and by the person so to be bound to serve him as a clerk as aforesaid; and in every such affidavit shall be specified the names of every such attorney or solicitor, and of every such person so bound, and their places of abode respectively, together with the day on which such contract was actually executed; and every such affidavit shall be filed within six months next after the execu-

tion of the said contract with and by the officer appointed or to be appointed for that purpose as herein-after mentioned, who shall thereupon enrol and register the said contract, and shall make and sign a memorandum of the day of filing such affidavit upon such affidavit, and also upon the said contract. *Id.* s. 8.

Provided, that in case such affidavit be not filed within such six months, the same may be filed by the said officer after the expiration thereof, but the service of such clerk shall be reckoned to commence and be computed from the day of filing such affidavit, unless one of the said courts of law or equity shall otherwise order. *Id.* s. 9.

And the officer so appointed or to be appointed for filing such affidavits as aforesaid, shall keep a book wherein shall be entered the substance of every affidavit which shall be so filed as aforesaid, specifying the name and place of abode of the attorney or solicitor to whom any person shall be bound to serve as a clerk, and of the clerk or person who shall be so bound as aforesaid, and of the person making such affidavit, with the date of the articles or contract in such affidavit mentioned or referred to, and the days of swearing and filing every such affidavit respectively; and such officer shall be at liberty to take, at the time of filing every such affidavit, the sum mentioned in the second

necessary upon the affidavit. 4 & 5 Vict. c. 34. Where no such affidavit was filed, Patteson J. refused to allow the clerk to be admitted, and also refused to allow the affidavit to be filed *nunc pro tunc*. *Ex p. Joy*, 3 Dowl. 342.

And within six months after the execution of the articles, they must be enrolled with the officer appointed for that purpose at the master's office; otherwise the service under the articles shall be deemed to commence only from the time of such enrolment. 34 G. 3, c. 14, s. 2. Where the articles were sent from the country to London, for this purpose, but after the clerkship was served no trace of them could be discovered in the office in which they should have been enrolled: the court refused to admit the clerk, although it appeared that in the books of the town agent, one of his clerks who had since left the country, had, about the time when the enrolment was supposed to have taken place, charged a sum as paid by him for the fee on the enrolment. *Ex p. Pilgrim*, 1 B. & C. 264. But where the original articles were lost, the court allowed a copy to be enrolled; *Ex p. Clarke*, 3 B. & A. 610. *Ex p. Chapman*, 3 Dowl. 562; and under similar circumstances they have allowed the draft of the articles to be enrolled. *Ex p. Beckenden*, 1 Har. & W. 193. And the same, where the articles were destroyed by fire. *Ex p. Briggs*, 3 Dowl. N. C. 94.

*Service.*] During the whole of the period specified in the articles, the clerk must continue and be actually employed by the attorney to whom he is bound, "in the proper business, practice, or employment of an attorney" (i). But if bound for five years, he may serve one with a barrister or special pleader, and one with the London agent of his master (j).

schedule to this Act annexed, and no more, as a recompense for his trouble in filing such affidavits and preparing and keeping such books as aforesaid; and such books shall and may be searched in office hours by any person whomsoever, without fee or reward. *Id.* s. 11.

(i) Every person, who now is or hereafter shall be bound by contract in writing to serve as a clerk to any attorney or solicitor, shall during the whole time and term of service to be specified in such contract, continue and be actually employed by such attorney or solicitor in the proper business, practice, or employment of an attorney or solicitor, save only and except in the cases hereinbefore mentioned. *Id.* s. 12.

(j) Provided that any person who now is or hereafter shall be

bound by contract in writing to serve as a clerk to a practising attorney or solicitor for the term of five years,—and who shall actually and *bond fide* be and continue as pupil with, and as such be employed by, any practising barrister, or any person *bond fide* practising as a certificated special pleader, in England or Wales, for any part of the said term, not exceeding one whole year,—and, in addition thereto or instead thereof, with the London agent of the attorney or solicitor to whom any such person shall be so bound by contract as aforesaid, for any part of the said term not exceeding one year,—either by virtue of any stipulation in such contract, or with the permission of such attorney or solicitor,—shall be capable of being examined, and sworn and admitted and en-

Where the clerk served his master the whole of the five years, with the exception of two months, which he passed at his father's house with his master's consent, and instead of which he served two additional months after the expiration of the five years: *Patteson J.* allowed him to be admitted. *Ex p. Hubbard*, 1 *Dowl.* 438. *Ex p. Frost*, 3 *Dowl.* 322, 1 *Har. & W.* 111, *S. P.* But if he serve a portion of his time to another attorney, even with his master's consent, it will not be sufficient. *Ex p. Hill*, 7 *T. R.* 456. The first contract must be altogether annulled, or the articles assigned, to render the subsequent service available. And so entirely must the time of the clerk be devoted to the learning of his profession during the stipulated time, that where a clerk, during the time he was under articles, also held a situation under government as surveyor of assessed taxes, and at the end of the five years was admitted, and commenced practising as an attorney: the court ordered him to be struck off the roll. *Re Taylor* 5 *B. & A.* 538. Afterwards, calculating this as a service for a certain time, this same person served another master for the remainder of the five years; but the court refused to admit him, holding that the services under the two sets of articles could not be coupled together, and that the service under the first articles could not be deemed service at all, within the meaning of the statute. *Ex p. Taylor*, 4 *B. & C.* 341. So where the clerk was bound to the same master as attorney and notary, and served *bonâ fide*, the court held it to be insufficient. *Scriveners Co. v. The Queen*, 12 *Law J.* 492 *ex. overruling R. v. Scriveners Society*, 11 *Law J.*, 59 *qb.* But where an articulated clerk, after doing all his master's business of the day, afterwards in his leisure hours did business for another attorney, for wages, *Ex p. Blunt*, 2 *W. Bl.* 764, or acted as auditor of a poor law union, *Ex p. Llewellyn*, 2 *Dowl. N. C.* 701, 12 *Law J.* 138 *qb.*, he was allowed to be admitted. And an objection for any defect in the articles, or in the service under the same, or in the admission or enrolment, must be made within twelve months after such admission or enrolment (*k*). So, service under articles shall be deemed sufficient, although the master be afterwards struck off the roll (*l*).

rolled as an attorney or solicitor, in the same manner as if he had served the whole of the said period of five years with the attorney or solicitor to whom he may be so bound. *Id.* s. 6.

(*k*) No person who has been admitted and enrolled shall be liable to be struck off the roll for or on account of any defect in the articles of clerkship, or in the registry thereof, or in his service under such articles, or in his admission and enrolment, unless the application for striking him off the roll

be made within twelve months from the time of his admission and enrolment; provided that such articles, registration, service, admission, or enrolment be without fraud. *Id.* s. 29.

(*l*) No person who shall have duly served his clerkship under articles in writing, pursuant to the provisions of this act, shall be prevented or disqualified from being admitted and enrolled as an attorney or solicitor, nor liable to be struck off the roll if admitted, by reason or in consequence of the at-

If the attorney discontinue his practice, or die, or the contract be annulled by mutual consent, or the clerk be discharged by rule of court, the clerk may afterwards bind himself to another attorney for the residue of the time specified in the first articles, and service under such contract shall be deemed good and effectual; provided an affidavit of the execution of such second articles be made and filed within the time and in the manner hereinbefore directed (*m*). Where such affidavit was not filed, Patteson, J. refused to admit the clerk, and refused also to allow the affidavit to be filed *nunc pro tunc*. *Ex p. Joy*, 3 Dowl. 342. The court, however, allowed a clerk to be admitted, where the second binding took place six years after the first. *Re Smith*, 1 D. & R. 14. *Ex p. Tomkins*, 6 Dowl. 3. Also, if the master become bankrupt, or take the benefit of the Insolvent Act, or be imprisoned for debt for 21 days, the court, upon the application of the clerk, may order him to be discharged from his articles, and assigned to such person as they shall deem fit (*n*). So, where the master absconds, the court will grant a rule to discharge the clerk from his articles, and that he may be at liberty to enter into further articles to some other attorney for the residue of his time. *Ex p. Wilkinson*, 9 Dowl. 320. *Ex p. Cartley*, 12 Law J., 98, *qb*. And the same, where the

torney or solicitor to whom he may have been bound by such articles having been after such service struck off the roll; provided that such clerk or person be otherwise entitled to be admitted and enrolled, according to the provisions herein-before contained. *Id. s. 28*.

(*m*) And if any attorney or solicitor, to or with whom any such person shall be so bound, shall happen to die before the expiration of the term for which such person shall be so bound, or shall discontinue or leave off practice as an attorney or solicitor,—or if such contract shall by mutual consent of the parties be cancelled,—or in case such clerk shall be legally discharged before the expiration of such term by any rule or order of the court wherein such attorney or solicitor shall have been admitted,—such clerk shall and may in any of the said cases be bound by another contract or other contracts in writing to serve as clerk to any other practising attorney or solicitor, or attornies or solicitors, during the residue of the said term, and service under such second or other contract in man-

ner herein-before mentioned shall be deemed and taken to be good and effectual, provided that an affidavit be duly made and filed of the execution of such second or other contract or contracts within the time and in the manner herein-before directed, and subject to the like regulations with respect to the original contract and affidavit of the execution thereof. *Id. s. 13*. See sect. 3, *ante*, p. 43.

(*n*) In case any attorney or solicitor, to whom any clerk shall be bound by contract in writing as aforesaid, shall, before the end or determination of such contract, become bankrupt, or take the benefit of any act for the relief of insolvent debtors, or be imprisoned for debt and remain in prison for the space of twenty-one days, it shall be lawful for any of the said courts of law or equity wherein such attorney or solicitor is admitted as aforesaid, upon the application of such clerk, to order and direct the said contract to be discharged, or assigned to such person upon such terms and in such manner as the said court shall think fit. *Id. s. 5*.

master disposed of his business, and went abroad. *Ex p. Hancock*, 2 *Dowl. N.C.* 54. So, where the master became insane, the court discharged the clerk from his articles. *Ex p. Darbell*, 6 *Dowl.* 505. And where the master thus became insane, and the business was carried on for some time by a clerk, and afterwards by another attorney, during which time the articulated clerk served in the office: Coleridge J. made an order that he should be discharged from his articles, and be at liberty to enter into fresh articles for the remainder of his time with another attorney; but he thought that the time he served after his master had become lunatic could not be reckoned in the five years. *Ex p. Turner*, 10 *Law J.*, 356, *qb. Ex p. Brown*, 9 *Dowl.* 526. So, where a party, articulated to one only of two members of a firm, served both until his master's death, and then served the surviving partner, it was holden by Patteson, J. that the time he thus served the latter, could not be reckoned in the five years, even although he had stipulated in his articles to serve both, and the surviving partner had received a moiety of the premium. *Ex p. Dalton*, 9 *Dowl.* 110. The second articles require a stamp of 1*l.* 15*s.* only.

Where the clerkship is thus put an end to, before the regular period of its expiration, the court, in cases favourable to the clerk, usually order a proportionate part of the premium paid by him, to be refunded. Even where an attorney refused to take back an articulated clerk, on the ground of misconduct, the court ordered him to return to the parents of the clerk a part of the premium which he had received with him. *Ex p. Frankerd*, 3 *B. & A.* 257. *Ex p. Fisher*, 1 *Chit.* 694. And where the clerk was articulated to one of two partners, and served the partnership for about two months, when the attorney to whom he was articulated died: the court, upon application, ordered the surviving partner to refund a proportionate part of the premium; although it appeared that at the time the premium was paid, the deceased partner was indebted to him, and the premium had been set off in account between them. *Ex p. Bayley*, 9 *B. & C.* 691. But where the attorney absconded, and made an assignment of his property to J. S. the court refused to order J. S. to refund any part of the premium. *Ex p. Carnley*, 2 *Dowl. N.C.* 945. The application in such a case is, to refer it to the master, to say what portion of the premium should be refunded; a rule nisi is granted on an affidavit of the facts, which is afterwards made absolute in the ordinary way.

## 2. Examination.

By stat. 6 & 7 Vict. c. 73, s. 3, no person shall be capable of being admitted and enrolled as an attorney, unless after the expiration of the time for which he is articulated he shall have been examined, in manner by that act directed(o). And by

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(o) See this section, *ante*, p. 43, n. (b.)

another clause in the act, the judges are required, before they grant a fiat for the admission of a person as an attorney, to examine and inquire as to his articles and service, and his fitness and capacity to act as an attorney; and if upon such examination, or by the certificate of examiners to be appointed(p), they be satisfied that such person is duly qualified, and fit and competent to act as an attorney, then and not otherwise they shall cause the oath to be administered to him(q).

There was a system of examination established, and exa-

(p) For the purpose of facilitating the inquiry touching the due service under articles as aforesaid, and the fitness and capacity of any person to act as an attorney, it shall be lawful for the Judges of the courts of Queen's Bench, Common Pleas, and Exchequer, (or any eight or more of them, of whom the chiefs of the said courts shall be three,) from time to time to nominate and appoint such persons to be examiners for the purposes aforesaid, and to make such rules and regulations for conducting such examination, as such judges shall think proper. *Id. s. 16.*

Provided always, that it shall be lawful for the master of the rolls, jointly with the judges of the courts of Queen's Bench, Common Pleas, and Exchequer, or with any eight or more of them, (of whom the chiefs of the said courts shall be three,) if they shall see fit so to do, to nominate and appoint examiners, and to make rules and regulations for conducting the examinations of persons applying to be admitted as attorneys and solicitors, as well touching the articles and service as the fitness and capacity of such persons to act both as attorneys and solicitors; and if the master of the rolls or any of the judges of the said courts of common law shall, by such examination, or by the certificate of such examiners, be satisfied that such person is duly qualified to be admitted to act as an attorney and solicitor, then, and not otherwise, the master of the rolls as to the court of Chancery, and one of the judges as to the said courts of law at Westminster, shall and he is hereby authorized to administer or cause to be administered to such person the oath herein-after directed to be taken by solicitors and attorneys

in addition to the oath of allegiance, and after such oaths taken to cause him to be admitted an attorney and solicitor, and his name to be enrolled as an attorney of the said courts of law at Westminster, and also a solicitor of the said high court of Chancery, which admissions shall be written on parchment, and signed by the master of the rolls or one of the judges of the said courts of law at Westminster, as the case may be. *Id. s. 18.*

(q) It shall be lawful for the judges of the said courts of Queen's Bench, Common Pleas, and Exchequer, or any one or more of them, and he and they is and are hereby authorized and required, before he or they shall issue a fiat for the admission of any person to be an attorney, to examine and inquire, by such ways and means as he or they shall think proper, touching the articles and service, and the fitness and capacity of such person to act as an attorney; and if the judge or judges as aforesaid shall be satisfied by such examination, or by the certificate of such examiners as herein-after mentioned, that such person is duly qualified and fit and competent to act as an attorney, then, and not otherwise, the said judge or judges shall and he and they is and are hereby authorized and required to administer or cause to be administered to such person the oath herein-after directed to be taken by attorneys and solicitors, in addition to the oath of allegiance, and after such oaths taken to cause him to be admitted an attorney of such court, and his name to be enrolled as an attorney of such court, which admission shall be written on parchment, and signed by such judge or judges respectively, and shall be stamped with the stamps

miners appointed, by rules of the judges, before this statute; and a certificate of the examiners as to the fitness of the party, was required, before he could be admitted. These examinations were holden within the last ten days in every term, in the hall of the Incorporated Law Society in Chancery-lane; and any person who wished to be examined, must have given a term's notice to the examiners of his intention to apply for examination. *R. G. H. 6 W. 4.*

If the clerk upon his examination were found deficient in his answers, he must have given fresh notice before he appeared a second time to be examined, *Re Examiners*, 8 *Ad. & El.* 745. *Re Henry*, 8 *Law J.*, 12, *qb.*, unless under peculiar

by law required to be impressed on the admission of attornies. *Id.* s. 15.

And it shall be lawful for the master of the rolls and he is hereby authorized and required, before he shall admit any person to be a solicitor, to examine and inquire, by such ways and means as he shall think proper, touching the fitness and capacity of such person to act as a solicitor, and for that purpose from time to time to appoint such persons as examiners, and to make such orders and regulations for conducting such examination, as he shall think proper; and if the master of the rolls shall, by such examination, or by the certificate of such examiners, be satisfied that such person is duly qualified to be admitted to act as a solicitor, then, and not otherwise, the master of the rolls shall and he is hereby authorized to administer or cause to be administered to such person the oath herein-after directed to be taken by attornies and solicitors, in addition to the oath of allegiance, and after such oaths taken to cause him to be admitted a solicitor in the court of Chancery, and his name to be enrolled as a solicitor in such court, which admission shall be written on parchment, and signed by the master of the rolls, and shall be stamped with the stamps by law required to be impressed on the admission of solicitors. *Id.* s. 17.

But all persons who, previously to the first day of January, one thousand eight hundred and forty-three, shall have been duly admitted and enrolled attornies or solicitors of any of the courts of

law or equity at Westminster, or of the courts of the duchy chamber of Lancaster at Westminster, or of the courts of the counties palatine of Lancaster and Durham, or either of them, shall and may be admitted and enrolled attornies and solicitors in the said high court of Chancery, or all or any of the said courts of Queen's Bench, Common Pleas, or Exchequer at Westminster, in pursuance of the provisions of this act, without examination, upon payment of such duty as by law required: provided always, that upon such admission being duly perfected, such persons shall be considered to have been attornies and solicitors of such court in which they shall be so admitted from the date of their first admission into any other of the said courts, provided that such admission be perfected on or before the first day of Michaelmas term, one thousand eight hundred and forty-four: and provided also, that until such attornies and solicitors of the said courts of the duchy chamber of Lancaster at Westminster, or of the said courts of the counties palatine of Lancaster and Durham, or either of them, shall be admitted and enrolled in the said high court of Chancery, or in all or any of the said courts of Queen's Bench, Common Pleas, or Exchequer at Westminster, it shall be lawful for any attornies or solicitors to act as their agents in any action, suit, or other proceeding in the said courts of the duchy chamber of Lancaster at Westminster, or of the counties palatine of Lancaster and Durham. *Id.* s. 45.



circumstances the court would dispense with it. *See Re Examiners*, 9 *Ad. & El.* 728. *Ex p. Grimstone*, 8 *Dowl.* 304.

Seven days before the term in which the party was to be admitted, he was obliged to leave his articles, and assignments (if any), together with his and his master's answers to certain preliminary questions, with the secretary at the Law Institution in Chancery-lane. But where the clerk was a day too late in sending in his answers, &c., owing to his master not having arrived in London in time, Williams, J. allowed it to be done nunc pro tunc. *Ex p. Lyons*, 6 *Dowl.* 517. So, where one of the masters to whom the clerk had been assigned, had absconded, so that this regulation could not be entirely complied with, Williams, J., notwithstanding, ordered the clerk to be examined. *Ex p. Carr*, 1 *Dowl. N. C.* 565. So where by mistake the assignment was annexed to the affidavit of its execution, and filed with it, Williams, J. ordered that the clerk should be examined, on producing an office copy of the assignment, with a certificate of the master, of the original being filed. *Ex p. Buckle*, 2 *Dowl. N. C.* 676.

It may be necessary to mention, that the clerk, under the former rules, to which we are now alluding, could not be examined until he had attained the age of twenty-one, *Ex p. Cragg* 6 *Dowl.* 256, unless the court, under particular circumstances, allowed of it; *see Ex p. Tebbs*, 9 *Dowl.* 151. *Ex p. Bousfield*, *Id.* 616, 10 *Law J.*, 361, *qb.*; nor before the expiration of the time for which he was bound, *Ex p. Bartlett*, 7 *Dowl.* 699, unless under special circumstances. *See Ex p. Twynam*, 8 *Id.* 293. And now, by stat. 6 & 7 *Vict. c. 73, s. 3, ante*, p. 42, n. (b), he cannot be examined, under any circumstances, until after the term for which he is bound has expired.

The examiners, however, could not refuse to examine the clerk, on account of any alleged defect in the service; if they did, the court upon application would direct them to examine him *de bene esse*, leaving the question as to the validity of the service open for the consideration of the court. *Examiners' case*, 5 *Bing. N. C.* 70. *S. C. nom. Ex p. Masterman*, 7 *Dowl.* 156. *Ex p. Llewellyn*, 12 *Law J.*, 138, *qb.*

Upon leaving the articles and assignments with the secretary at the Law Institution, you pay a fee of 10s. For the examination and certificate you pay a fee of two guineas. 6 & 7 *Vict. c. 73, sch. 2.*

### 3. Admission, &c.

*Notice of intention to apply for admission.*] Formerly, every clerk who intended to apply for admission, must, for the space of one full term previous to the term in which he intended to apply, have caused "his name and place of abode, and also the name or names and place or places of abode of the attorney or attornies, to whom he shall have been articled, written in

legible characters," to be affixed on the outside of the court, in which he was to be admitted, in such place as public notices were usually affixed, and also in some conspicuous place in the chambers of each of the judges of the court, and also in the King's Bench office or Common Pleas office. *R. T. 31 G. 3, K. B. C. P.*

This is somewhat altered at present. Instead of affixing it on the outside of the court, it is now ordered by *R. G. H. 6 W. 4*, that "three days at the least" (that is to say, three days exclusive, *Anon. 2 Har. & W. 65*) "before the commencement of the term preceding that in which any person not before admitted shall propose to be admitted an attorney of either of the courts, he shall cause to be delivered at the master's or prothonotary's office, as the case may be, instead of affixing the same on the walls of the courts as now required, the usual written notices, which shall state, in addition to the particulars now required, his place or places of abode or service for the last preceding twelve months; and the master or prothonotary, as the case may be, shall reduce all such notices as in this rule first mentioned, into an alphabetical table or tables, under convenient heads, and affix the same on the first day of term in some conspicuous place within, or near to and on the outside of each court." Soon after this rule was promulgated, many mistakes were made in not delivering the notice to the master in time; but as the rule was not then very well known, and the error therefore excusable, the court in most cases allowed the name, &c., to be inserted in the master's list after the time here mentioned. See *Ex p. Blunt*, 5 *Dowl.* 231. Under special circumstances, also, the court have allowed the clerk to put up his notices after the commencement of the term, with a view of being admitted on the last day of the following term. *Ex p. Chandler*, 1 *Dowl. N. C.* 814. Where the 15th April fell on Easter Sunday, and the Wednesday was therefore the first day of Easter term, a delivery of the notices to the master three days before the 18th, was holden to be in time. *Ex p. Bayley*, 6 *Dowl.* 516. The clerk must also give a term's notice, to the same effect, to the examiners, by leaving the same with the secretary of the Law Society at the hall of that society in Chancery-lane. *R. G. H. 6 W. 4, s. 4.*

Also, by a rule of the court of Queen's Bench, instead of sticking up the notices in the judges' chambers, which was found inconvenient, it is ordered that the party intending to apply shall "for the space of one full term, previous to the term in which such person shall apply to be admitted, enter or cause to be entered in a book to be kept for that purpose at each of the judges' chambers of this court, his name and place of abode, and also the name and place of abode of the attorney or attorneys to whom he shall have been articulated; and that no person who shall not have complied with this rule, shall in future be admitted an attorney." *R. T. 33 G. 3.* This must be

done at least the day before the term; but the court, under peculiar circumstances, have allowed the clerk to be admitted, notwithstanding the notices were not entered until the first day of term. *Ex p. Downing*, 8 *Law J.*, 232, *qb.*

So that now, in all the courts, one copy of this notice must be delivered at the master's office three clear days at least before the term immediately preceding that in which the party is to apply for admission. And before the same term, one other copy must be given to the examiners, as above directed; and five more copies must, in the court of Queen's Bench, be entered in the books kept for that purpose at the chambers of the judges of that court respectively, or in the court of Common Pleas, must be affixed in a conspicuous place in the respective chambers of the judges. *Ex p. Gordon*, 2 *Dowl.* 470. *Re Parsons*, 5 *Nev. & M.* 241, 1 *Har. & W.* 349. And one more copy must be affixed also before the term, in the usual place in the Queen's Bench office or the Common Pleas office, as the case may be. The notice in the office being that which gives the greatest publicity to the intended application, will not be dispensed with: *Ex p. Morgan*, 4 *Dowl.* 296: where, indeed, through illness, this notice was not affixed in the office until the fourth day of term, Taunton, J. allowed the clerk to be admitted in the following term; *Ex p. Herbert*, 2 *Dowl.* 172; but where, through inadvertence, it had not been affixed at all, Littledale, J. refused to admit the clerk; he said, however, that upon giving fresh notices, he would allow him to be admitted on the last day of the following term. *Ex p. Stonehurst*, 1 *Har. & W.* 517, and see *Ex p. Chandler*, 1 *Dowl. N. C.* 814, *S. P.* But as to the entry of the notices in the books at the judges' chambers, where, through the inadvertence of the London agent, the notice was entered in the book at the chambers of the chief justice only, and not at the chambers of the other judges, until within a few days of the second term, Littledale J., allowed the party to be admitted on the last day of term. *Ex p. Woolright*, 1 *Har. & W.* 517, 4 *Dowl.* 274, and see *Ex p. Downing*, *supra*.

The notice, we have seen, must state the name and place of abode of the master; and of all the masters the clerk may have served during his clerkship. If there be a mistake in the name, *Ex p. Dobson*, 2 *Dowl.* 539, or if any name be omitted, *Ex p. Jones*, 1 *Dowl.* 439, but see *Ex p. Collins*, 6 *Dowl.* 495, the court usually refuse to admit the clerk. In one case, however, where a wrong name had been inserted by mistake, they allowed the notice to be amended, and the party to be admitted on the last day of the following term. *Re Clarke*, 4 *Nev. & M.* 709, 1 *Har. & W.* 146, and see *Ex p. Dukes*, 7 *Dowl.* 605. And where a clerk, who had changed his name during his clerkship, by mistake inserted in his notices his present name only, and not his former one, the court allowed him to put up fresh notices, and to be called in

the following term. *Ex p. Ridley*, 2 Har. & W. 66. Where both master and clerk had two christian names, and they were described by both in the notices, but by one only in the articles: the court allowed the clerk to be admitted, on an affidavit of the identity of the party. *Ex p. Croft*, 1 Har. & W. 375, 5 Nev. & M. 58.

The form of the notice will be found in the Appendix.

In some cases, under peculiar circumstances, where the clerk was going to one of the colonies, or a foreign country, to practise there as an attorney, the court, upon special application for the purpose, have allowed him to be admitted, before his notices have been given the time required by the rules above mentioned. See *Ex p. Hulme*, 1 Har. & W. 366, 4 Dougl. 88. *Ex p. Lawson*, 2 Har. & W. 85. *Ex p. Handcock*, *Id.* 99.

It will be perceived that these notices must be given three days exclusive before the commencement of the term next preceding that in which the clerk is to be admitted; (*ante*, pp. 51, 52;) and therefore if the clerk be not admitted in the second term, all these notices must be again given, before he can apply for admission. *Ex p. Blunt*, 12 Law J., 97, *qb.* In one case, indeed, where, under peculiar circumstances, the clerk did not apply until the third term, Littledale, J. although he could not order him to be admitted then, granted a rule that upon then giving his notices, he should be admitted on the last day of the fourth term. *Ex p. Southern*, 6 Dougl. 26.

*Swearing, admission, &c.*] Engross an affidavit of service (r), (*see the form, in the Appendix,*) and annex it to the copy of the articles executed by your master; also engross an affidavit of the stamp duty being paid, (*see the form, in the Appendix,*) and let both affidavits be sworn before a judge.

Having made these two affidavits, *call at the master's office, and get the original affidavit of the execution of the articles, which you had filed there (s.) Pay him 2s. 6d. Then take these*

(r) Every person who shall have been or shall be bound as a clerk as aforesaid, shall, before he be admitted an attorney or solicitor according to this act, prove, by an affidavit of himself or of the attorney or solicitor to whom he was bound as aforesaid, or such agent, barrister, or special pleader as aforesaid, to be duly made and filed with the proper officer herein-before mentioned, that he hath actually and really served and been employed by such practising attorney, solicitor, agent, barrister, or special pleader, during the whole time and in the manner required by the provisions of this

act, and in the form to be approved by the judges of the court wherein such person shall apply to be admitted. *Id.* s. 14.

(s) No person, who shall from and after the passing of this act become bound as aforesaid, shall be admitted an attorney or solicitor, before such affidavit so marked as aforesaid shall have been produced to the court or judge to whom such person shall apply to be admitted an attorney or solicitor, in pursuance of the provisions hereinafter contained, unless such court or judge shall be satisfied that the same cannot be produced, and shall think fit.

*three affidavits, your articles, (see Ex p. Clarke, 3 B. & A. 610. Ex p. Nicholls, 1 Dowl. N. C. 263,) and the certificate of the examiners as to your fitness, to the chambers of one of the judges of the court, and give them to the clerk, who will thereupon obtain the judge's fiat for your admission; pay him one guinea. Then take the fiat, affidavit of due execution, articles, and certificate to the master's office; give them to the clerk, and pay him at the same time 25l. (the stamp duty on your admission,) and his fees. Attend afterwards at Westminster, at such time as he may appoint, and you will be sworn (t), and sign the oath roll; and your admission on stamped parchment, signed by one of the judges or masters, will be delivered to you (u.) Pay the crier 1s. for the oath, and 5s. on your signing the roll. You then take this admission to the master's office (v), and the clerk there will*

to dispense with the production thereof. *Id.* s. 10.

(t) Every person who shall pursuant to this act apply to be admitted an attorney or solicitor, shall, before he be admitted and enrolled as aforesaid, take and subscribe the oath, or, if he be one of the people called Quakers, the affirmation, following: 'I A. B. do swear [or solemnly affirm, *as the case may be*], That I will truly and honestly demean myself in the practice of an attorney [or solicitor, *as the case may be*,] according to the best of my knowledge and ability. So help me God.' *Id.* s. 19.

(u) It is provided by the act, that every person who at the time of the passing of this act shall have completed his period of service according to the laws in force at the time of the passing of this act, but shall not have been admitted an attorney or solicitor in pursuance of such service, shall, if otherwise qualified, be capable of being admitted and enrolled an attorney or solicitor, in pursuance of the provisions of this act, in the same manner in all respects as if he were actually bound by contract in writing at the time of the passing of this act. *Id.* s. 44.

(v) The masters of the several courts of law at Westminster, or such other person or persons as the lord chief justice of the court of Queen's Bench, the lord chief justice of the court of Common Pleas, and the lord chief baron of the court of Exchequer, shall for that purpose severally and res-

pectively appoint, shall be deemed and taken to be the proper officers for filing such affidavits as aforesaid in the said respective courts, and they shall have the custody and care of the rolls or books wherein persons are at present enrolled as attorneys in the said respective courts, and shall and they are hereby respectively required from time to time, without fee or reward, other than such sum or sums as are mentioned in the second schedule hereunto annexed, to enrol the name of every person who shall be admitted an attorney in the said respective courts, pursuant to the directions in this act, and the time when admitted, in alphabetical order, in rolls or books to be provided and kept for that purpose in their several and respective offices; and also that the Queen's remembrancer in the court of Exchequer or his deputy, and the chief clerk of the court of the duchy chamber of Lancaster at Westminster or his deputy, and the prothonotaries of the courts of the counties palatine of Lancaster and Durham or their deputies, or such person or persons as the lord chief justice of the court of Queen's Bench, the lord chief justice of the court of Common Pleas, and the lord chief baron of the court of Exchequer shall jointly appoint, shall have the custody and care of the rolls or books wherein persons are at present enrolled as attorneys and solicitors in the said last-mentioned respective courts, which said prothonotaries of the courts

enter your name upon the roll of the attornies of the court. Pay him 10s. This enrolment is made by the masters of the Queen's Bench and Exchequer, as a matter of course, even without instruction; but it is otherwise in the Common Pleas. In prudence you should see that it is done, for an omission in this respect may be of serious consequences to you. An attorney, although admitted, yet if not enrolled, has no legal right to costs; and in a late case, where the attorney for the defendant was not enrolled, the court of Common Pleas stayed the proceedings, upon a verdict for the defendant, without costs. *Humphreys v. Harvey*, 1 Bing. N. C. 62, 2 Dougl. 827. And in a similar case, where an action for penalties was brought against the attorney for practising, his name not being on the roll of attornies, the court held that they could not relieve him, by allowing his name to be enrolled *nunc pro tunc*, as the right of a third person would thereby be compromised; they intimated, however, that they would have done so, if the action had not been brought. *Ex p. Swift*, 1 Bing. N. C. 734, 1 Hodg. 175.

If an admission be fraudulently obtained, the court will strike the party off the roll; and if the master be concerned in the fraud, they will grant an attachment against him. *Ex p. Hill*, 2 W. Bl. 991.

After being thus admitted and enrolled, the party then ob-

of the counties palatine of Lancaster and Durham or their deputies, or such person or persons as shall be appointed as last mentioned, shall be deemed and taken to be the proper officers for filing such affidavits as herein-before mentioned in the court of Common Pleas at Lancaster and the court of pleas at Durham respectively; and he and they is and are hereby respectively required from time to time, without fee or reward, other than such sum or sums of money as are now payable to enrol the name of every person who shall be admitted an attorney in the said last-mentioned respective courts pursuant to the directions in this act, and the time when admitted, in alphabetical order, in rolls or books to be provided and kept for that purpose in their several and respective offices; and also that the senior clerk of the petty bag office in the court of Chancery, or his deputy, the chief clerk of the duchy chamber of Lancaster at Westminster, or his deputy, the registrars of the respective courts of equity in the

counties palatine of Lancaster and Durham, and such other person or persons as the master of the rolls shall for that purpose appoint, shall have the custody and care of the rolls or books wherein persons are at present enrolled as solicitors, and which said clerk of the petty bag office, or such other person or persons as shall be appointed as last mentioned, shall be deemed and taken as the proper officer or officers for filing such affidavits as herein-before mentioned in the court of Chancery; and he and they is or are hereby also respectively required from time to time, without fee or reward other than as last aforesaid, to enrol the name of every person who shall be admitted a solicitor pursuant to the directions in this act, and the time when admitted, in alphabetical order in rolls or books to be kept for that purpose, —to which rolls or books in the said courts of law or equity respectively all persons shall and may have free access, without fee or reward. *Id.* s. 20.

tains his certificate, and has his name and address entered in the book kept for the purpose in the master's office, as directed, *post*, p. 58.

### Attorney.

#### 1. His certificate, privileges, &c.

*Certificate.*] After an attorney is admitted, sworn, and enrolled, still he cannot practise as an attorney, until he have first obtained and entered his certificate; otherwise he will be liable to a penalty of 50*l.* 3*l.* 4*s.* 6*d.* 30. See *Edmonson v. Davis*, 4 *Esp.* 14, 3 *B. & P.* 382. *Barnard v. Gosling*, 2 *East*, 569. *Slack v. Wilkins*, 1 *Cr. & M.* 23, and see *Eyre v. Shelley*, 6 *Mees. & W.* 269. *Re Hodgson & Ross*, 3 *Ad. & El.* 224. *Hodkinson v. Mayer*, 6 *Ad. & El.* 194. For this purpose, it is necessary, in the first place, to deliver to the registrar of attornies (*it*) a declaration in writing, containing the party's

(*it*) From and after the passing of this act, there shall be a registrar of attornies and solicitors, and that it shall be the duty of such registrar to keep an alphabetical roll or book, or rolls or books, of all attornies and solicitors, and to issue certificates of persons who have been admitted and enrolled as attornies or solicitors, and are entitled to take out stamped certificates authorizing them to practice as such; and it shall be lawful to and for the lord chief justice of Her Majesty's court of Queen's Bench, the master of the rolls, the lord chief justice of the court of Common Pleas, and the lord chief baron of the court of Exchequer, (or any three of them, of whom the master of the rolls shall be one,) to make such orders, directions, and regulations touching the performance and execution of the duties aforesaid as they shall think proper; and such registrar, or some person duly appointed by him, shall have free access to and shall be at liberty from time to time to examine and take copies or extracts, without fee or reward, of all rolls or books kept for the enrolment of attornies and solicitors in any of the courts at Westminster, and for the enrolment of attornies and solicitors in the court of the duchy

of Lancaster, or court of the duchy chamber of Lancaster at Westminster; or in any courts of the counties palatine of Lancaster and Durham; and that the duties of such office of registrar shall be performed by the incorporated "Society of attornies, solicitors, proctors, and others, not being barristers, practising in the courts of law and equity of the United Kingdom," whether by their present or any future charter of incorporation, unless and until the lord chief justice of the court of Queen's Bench, the master of the rolls, the lord chief justice of the court of Common Pleas, and the lord chief baron of the court of Exchequer (or any three of them, of whom the master of the rolls shall be one,) shall, by any order under their hands, which order they are hereby authorized and empowered to make, appoint any fit and proper person to perform the said duties in the place and stead of the said society, (which said person shall be called the registrar of attornies and solicitors, and shall hold such office or employment during pleasure only,) and so from time to time to appoint any other fit and proper person, or the said society, to perform the said duties during pleasure. *Id.* s. 21.

name and place of residence, the court or one of the courts of which he is an attorney, and when admitted; and if he be entitled to the stamped certificate, the Registrar will give him a certificate to that effect; *fee* 1s. 6d.; and upon producing that at the stamp office, the stamped certificate will be given to him, upon payment of the duty (x). The duty is regulated by the stamp act, 55 G. 3, c. 184, thus: if the attorney have not been admitted three years, he is to pay 6*l.* if he reside within

(x) From and after the 15th day of November next, it shall not be lawful for the commissioners of stamps and taxes, or any of their officers, to grant or issue to any person any stamped certificate authorizing such person to practise as an attorney or solicitor, unless nor until he shall leave with the said commissioners, or their proper officer, at the head office for stamps and taxes at Somerset House in the county of Middlesex, a certificate from such registrar as aforesaid that such person is an attorney or solicitor, and entitled to take out such stamped certificate; and the said commissioners, or their proper officer, shall deliver to the said registrar, on the sixth day of April in every year, or so soon afterwards as the said registrar shall apply for the same, all such registrar's certificates under the authority of which any stamped certificates shall have been granted or issued since the 15th day of November preceding, with a note or memorandum endorsed or written thereon respectively by the proper officer of the said commissioners, stating the date of the stamped certificate granted or issued in respect thereof, and shall from time to time afterwards, whenever application shall be made for that purpose by the said registrar, deliver to him all such other registrar's certificates under the authority of which any stamped certificates shall have been granted or issued upon or after the sixth day of April and before the sixteenth day of November in every year, with a like note or memorandum endorsed or written thereon respectively as aforesaid. *Id.* s. 22.

And for the purpose of obtaining such registrar's certificate as aforesaid, a declaration in writ-

ing, signed by such attorney or solicitor or by his partner, or in case such attorney or solicitor shall reside more than twenty miles from London, then by his London agent on his behalf, containing his name and place of residence, and the court or one of the courts of which he is then admitted an attorney or solicitor, together with the term or year in or as of which he was so admitted, shall be delivered to the said registrar, who shall cause all the particulars in such declaration to be entered in a proper book to be kept for that purpose, which shall be open to the inspection and examination of all persons without fee or reward; and the said registrar shall, after the expiration of six days after the delivery of such declaration (unless he shall see cause and have reason to believe that the party so applying for such certificate is not upon the said roll of attorneys or solicitors), deliver to the said attorney or solicitor, or to his agent, on demand, a certificate in the form set forth in the third schedule in this act annexed, and which last-mentioned certificate shall be delivered to and left with the commissioners of stamps and taxes as herein-before directed. *Id.* s. 23.

And in case the said registrar shall decline to issue such certificate as he is herein-before directed and required to give, the party so applying for the same, if an attorney, shall and may apply to any of the said courts of law at Westminster, or to any judge thereof, or, if a solicitor, to the master of the rolls, who are hereby respectively authorized to make such order in the matter as shall be just, and to order payment of costs by and to either of the parties, if they shall see fit. *Id.* s. 24.



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where he may be so served with notices, &c., he shall make the like entry thereof in the said book." *R. H. 8 G. 3, K. B.* So in the Exchequer office, a similar book is kept, in which every attorney admitted in that court must enter "his name and place of abode (or some other proper place) in London, Westminster, or the borough of Southwark, or within one mile of the said office," for the like purpose; and the same, upon every change of residence, &c. *R. M. 1 W. 4, Ex.* There is no such book, I believe, kept in any of the offices of the court of Common Pleas, except that in which the certificates are registered, as already mentioned, *ante*, p. 54, 55. Although the above rules merely mention "notices, summonses, orders, and rules," they in fact extend to all proceedings; and where, in the Exchequer, the plaintiff's attorney, who resided at a distance of seven miles from London, had entered in the book his place of abode only, and not any place within a mile of the Exchequer office, as he should have done; and a plea was sent to him by post on the last day of pleading, but did not reach him until the next morning, after his clerk had gone to London for the purpose of signing judgment, and judgment was signed accordingly: the court, upon application, set aside the judgment. *Blackburn v. Peat*, 2 Cr. & M. 244.

*Certificate, after default made in taking it out for a year.*] Formerly, if an attorney had not taken out his certificate for a year, his admission was void, and he was no longer deemed to be upon the roll of attorneys. 37 G. 3, c. 90, s. 31. But this is repealed, by 6 & 7 Vict. c. 73; and now the only regulation upon the subject is, that if the attorney do not obtain his annual stamped certificate within the time limited by law, the registrar will not grant him a certificate to obtain it, without the order of the court or a judge authorizing him to do so. *Id.* s. 25 (x). It is likely, however, that the courts, in granting such an order, will be governed by the same rules which they formerly observed upon the re-admission of attorneys.

And formerly, when an attorney applied to be re-admitted, if it appeared that he had not practised since the expiration of his last certificate, the court allowed him to be re-admitted, without the payment of any fine or arrears of duty, *Ex p. Clarke*, 2 B. & A. 314. *Ex p. Matson*, 2 D. & R. 238. *Ex p. Cunningham*, 1 Bing. 91. *Ex p. Thompson*, 2 Dowl. 160, upon

(x) If any attorney or solicitor shall neglect to procure an annual stamped certificate authorizing him to practise as such, within the time by law appointed for that purpose, then and in such case the said registrar shall not afterwards grant a certificate to such attorney or solicitor, without the order of the master of the rolls in the case of a solicitor, or of one of

the courts of Queen's Bench, Common Pleas, or Exchequer, or of one of the judges thereof, in the case of an attorney, authorizing such registrar to issue such certificate; and it shall be lawful for the master of the rolls, or for such court or judge, to make such order, upon such terms and conditions as he or they shall think fit. *Id.* s. 25.

his satisfying the court as to his reason for discontinuing to practise, see *Ex p. Mayer*, 5 *Moore*, 141. *Ex p. Maliphant*, 7 *Moore*, 495, and as to the manner in which he has since been employed. *Ex p. Saunders*, 2 *Smith*, 154. Where the year during which the party was uncertificated expired on a Sunday, and he applied for his certificate on the Monday, but was refused, the court upon application re-admitted him on the Tuesday, without requiring him to give the usual notices. *Ex p. Knipe*, 9 *Dowl.* 108. *S. P. Ex p. Wybrow*, *Id.* 197. And where an attorney ceased to take out his certificate, and discontinued his practice for two years, and then (without being re-admitted) took out his certificate, and practised: the court allowed him to be re-admitted, on payment of a nominal fine, and of the duty for the two years in which he had not taken out his certificate. *Ex p. Sherwood*, 7 *Moore*, 493. There was no particular time limited for this application; the court have entertained it after the lapse of many years. See *Ex p. Cunningham*, 1 *Bing.* 91. *Ex p. Smith*, 1 *Chit.* 692. *Ex p. Calland*, 2 *B. & A.* 315. But where a party had discontinued his practice for thirty years, and was employed in the meantime as an officer of the customs, Littledale, J. refused to re-admit him, saying that after such a lapse of time, without being in any way accustomed to legal practice, he was not fit to be re-admitted. *Ex p. Billings*, 5 *Dowl.* 395; and see *S. P. Ex p. Rudge*, 12 *Law J.*, 186, *qb.* But where in a similar case, although the party had been off the roll for 27 years, yet as during the last two years he had been managing clerk to an attorney, and his master made a strong affidavit as to his capacity as a lawyer, Williams, J. allowed him to be re-admitted. *Ex p. Brabant*, 7 *Dowl.* 622. Where an attorney had been struck off the roll at his own request, the court allowed him to be re-admitted, even after the lapse of fifteen years, without payment of any fine or arrears of duty; *Ex p. Calland*, 2 *B. & A.* 315; but where an attorney was struck off the roll, at his own request, for the purpose of being called to the bar, and was called to the bar accordingly: the court afterwards refused to allow him to be re-admitted as an attorney. *Ex p. Cole*, 1 *Doug.* 114.

Where the party had continued to practise, after the expiration of his certificate, not knowing at the time that he was uncertificated, and the omission to take out his certificate was attributable solely to the misconduct of his clerk or to the mistake or inadvertence of his agent: the court have allowed him to be re-admitted, upon payment of the arrears of duty and a small fine, without giving the usual notices, *Ex p. Dent*, 1 *B. & A.* 189. *Ex p. ———*, 1 *Chit.* 163, 646. *Ex p. Davis*, *Id.* 673. *Re Winter*, 8 *Taunt.* 129. *Ex p. Christian*, 3 *Moore*, 578. *Ex p. Ford*, 1 *Har. & W.* 192. *Ex p. Thorpe*, 3 *Dowl.* 592. *Ex p. Rigby*, 1 *Nev. & M.* 593. *Ex p. Leacroft*, 4 *B. & A.* 90. *Ex p. Legh*, 1 *Dowl. N. C.* 188,

except a notice to the stamp office of the intended application. *Ex p. Franks*, 3 *Dowl.* 319. *Ex p. Bridgman*, 3 *Dowl.* 371. So, where the party, through the mistake of his agent, paid only 4*l.* instead of 8*l.* a year for his certificate, for some years, and his agent, by accident, omitted to take out his certificate during the last year, of all which the attorney himself was ignorant, Pattenon, J. allowed him to be re-admitted, on payment of the arrears of duty, and a fine of 20*s.* *Ex p. Jones*, 2 *Dowl.* 199.

Where the party had knowingly acted without his certificate, the court would not re-admit him without payment of a fine, as well as of the duty for the years in which he had so acted. *Ex p. Stonecroft*, 1 *Har. & W.* 368. *Ex p. Minchin*, 5 *Dowl.* 253. And even on these terms, the court did not attend very favourably to applications of the kind. *Ex p. Philpot*, 3 *Dowl.* 339. *Ex p. Lowerton*, 1 *Hodg.* 77. But where actions for penalties had been brought against the party for acting without his certificate, and the penalties were remitted by the commissioners of stamps, Littledale, J. said that under such circumstances the party stood in the same situation as a person who had not practised, and he ordered him to be re-admitted on taking out his certificate for the current year. *Ex p. Tufkin*, 1 *Har. & W.* 516. And where it was by mistake that the certificate was not taken out within the year, Littledale, J. allowed the party to be re-admitted, upon paying a fine of 20*s.* and the arrear of duty, without the usual notices. *Ex p. Minchin*, 5 *Dowl.* 253. So, where the party acted as attorney abroad, it was holden that he might be re-admitted upon the same terms of re-admission as where the party had not practised; for the statute extends only to practising in this country. *Ex p. Philcox*, 2 *Dowl.* 450. And the same, where the only business done was in a borough court, in which persons, not attornies, might practise. *Ex p. Thomson*, 5 *Dowl.* 275.

The affidavit should state that the party was admitted, and when; see *Ex p. Wentworth*, 2 *Dowl.* 607; from and up to what times he continued to take out his certificate; the reason for his discontinuing to do so; see *Ex p. Maliphant*, 7 *Moore*, 495. *Ex p. Mayor*, 5 *Moore*, 141; how he has been employed since; *Ex p. Saunders*, 2 *Smith*, 154; the place or places of the party's abode during the preceding year; the service of the notice at the stamp office, when necessary; *vide supra*; and any other facts that may be requisite to bring his case within the rules established by the cases here mentioned.

Formerly, previous to an application for a re-admission, regular notices were obliged to be given, in the same manner, and nearly in the same form, as upon an original admission; and the affidavit above mentioned was always filed with the master, at the time the usual notice was delivered at his office.

But as the party was then actually off the roll, and as he is now no longer so, by omitting to take out his certificate, the reason for giving these notices has ceased, and they seem to be no longer required.

Where the Law Institution opposed the re-admission of an attorney, on the ground that he had been twice convicted of conspiracies to extort money, by means of libels in a newspaper: Wightman, J. refused to re-admit him, saying, that he was not a fit person to be upon the rolls of the court. *R. v. Hardone*, 9 Dowl. 970.

*Admission in other courts.*] After a party has been sworn in and admitted as an attorney in one of the courts of law at Westminster, he shall be entitled to be admitted as an attorney in any other of the said courts, or in any inferior court in England or Wales, upon signing the roll of such court, but not otherwise (a).

The fee is to be paid in the first instance to the clerk of the judge who grants the fiat, and by him is paid over to the chief justice or chief baron of the court; and the day after the end of such term, the fees thus received are divided into fifteen portions, and one paid to the clerk or clerks of each of the judges. *R. G. M. 2 Vict.* The fees paid to the ushers, are in like manner distributed among the ushers of all the courts. *Id.*

Persons who were attorneys of the courts of sessions or great sessions in the county palatine of Chester, or in Wales, may be admitted attorneys in any of the courts at Westminster, 11 G. 4 & 1 W. 4, c. 70, ss. 15, 16, provided they were practising attorneys at the time of the passing of that act. *Id. Ex p. Garratt*, 2 Dowl. 371. *Ex p. Read*, 1 B. & Ad. 957.

(a) Every person who shall have been duly admitted an attorney of any one of the superior courts of law at Westminster, shall be entitled, upon the production of his admission therein, or an official certificate thereof, and that the same still continues in force, to be admitted as an attorney in any other of the said courts, or in any inferior court of law in England and Wales, upon signing the roll of such other court, but not otherwise, and shall thereupon be entitled to practise as an attorney therein, in like manner as if he had been sworn in and admitted an attorney of such court: provided always, that no additional fee besides those payable by virtue of this act shall be demanded or

paid; and that every person who shall have been duly admitted a solicitor of the high court of Chancery, shall be entitled, upon the production of his admission therein, or an official certificate thereof, and that the same still continues in force, to be admitted as a solicitor in any inferior court of equity in England and Wales, and in the court of bankruptcy, upon signing the roll of such other court, but not otherwise, and shall thereupon be entitled to practise as a solicitor therein, in like manner as if he had been sworn in and admitted a solicitor of such court; provided also, that no additional fee, besides those payable by virtue of this act, shall be demanded or paid. *Id. s. 27.*

This is effected by producing at the master's office the original admission, with an affidavit that the party was a practising attorney at the time of the passing of this act; the clerk will tell him at what time to attend at Westminster; and upon his attending accordingly, he will be sworn and admitted. Let him then get the admission enrolled. *See ante*, pp. 54, 55.

*Unqualified persons acting.]* If any person act as an attorney without being admitted and enrolled as aforesaid, he shall be deemed guilty of a contempt of the court in which the proceeding shall be, and shall be incapable of suing for his fees (*b*). If he act in the name of an attorney, without his knowledge or consent, the court will set aside his proceeding; *Norton v. Curtis*, 3 Dowl. 245; but such proceeding cannot be treated as a nullity. *Hill v. Mills*, 2 Dowl. 696. So if he act in his own name, you cannot treat the proceeding as a nullity; *Bayley v. Thompson*, 2 Cr. & M. 673; but you may move to stay his proceedings until a proper attorney shall be appointed. *Id.* Or if he act for a defendant, perhaps you may move to set aside his proceeding, unless before a certain time a proper attorney be appointed.

If any attorney shall act as agent for an unqualified person, or suffer his name to be made use of upon the account or for the profit of such person, or shall send process to such person, or do any other act to enable him to practise as an attorney, knowing him not to be duly qualified to act as such: upon complaint thereof to the court from which the process issued,

(*b*) In case any person shall in his own name or in the name of any other person sue out any writ or process, or commence, prosecute, or defend any action or suit or any proceedings in any court of law or equity, without being admitted and enrolled as aforesaid, or being himself the plaintiff or defendant in such proceedings respectively,—every such person shall and is hereby made incapable to maintain or prosecute any action or suit in any court of law or equity for any fee, reward, or disbursements, on account of prosecuting, carrying on, or defending any such action, suit, or proceeding, or otherwise in relation thereto; and such offence shall be deemed a contempt of the court in which such action, suit, or proceeding shall have been prosecuted, carried on, or defended, and shall and may be punished accordingly. *Id.* s. 35.

And in case any person shall commence or defend any action,

or sue out any writ, process, or summons, or carry on any proceedings, in the court commonly called the county court holden in any county in that part of Great Britain called England and Wales who is not or shall not then be legally admitted an attorney or solicitor according to this act, or shall not himself be plaintiff or defendant in such proceeding respectively, such person shall and is hereby made incapable to maintain or prosecute any action or suit in any court of law or equity for any fee, reward, or disbursement, on account of prosecuting, carrying on, or defending any such action, suit, or proceeding, or otherwise in relation thereto; and such offence shall be deemed a contempt of the court in which such action, suit, or proceeding shall have been prosecuted, carried on, or defended, and shall and may be punished accordingly. *Id.* s. 36.

the attorney shall be "struck off the roll, and for ever after disabled from practising as an attorney or solicitor," and the court may commit the unqualified person to the prison of the court, for any time not exceeding one year. 6 & 7 Vict. c. 73, s. 32 (c). The court in such a case will not entertain an application against the unqualified person alone, but the attorney must also be made a party; *Re Hodson*, 1 Har. & W. 110, 3 Doucl. 330; but they will receive a complaint against the attorney alone. Where an attorney, who resided at C., occasionally occupied part of a house in B., in which his articled clerk resided, the names of both being on the door; the clerk was in the habit of attending a court of requests and before magistrates for his own profit; he also conducted an appeal in the name of his master, who allowed part of the bill to be paid by a suit of clothes made for the clerk; it also appeared that several writs had been placed in the hands of an officer to execute, having the master's name upon them, for some of which the master paid, but referred the officer to the clerk for the remainder, saying it was the clerk's business and not his; and in an action carried on in the name of the master, with his knowledge and concurrence, the clerk appeared and acted as attorney, and after the verdict claimed to have the costs paid to himself, and objected to their being paid to the master: the court held this to be a case within stat. 22 G. 2, c. 46, s. 11, which was nearly in the same words as the above statute, and ordered the attorney (against whom alone the application was made) to be struck off the rolls. *Re Palmer*, 1 Har. & W. 55. 4 Nev. & M. 529. So, where an attorney engaged a certificated conveyancer to conduct his business, and agreed to allow him a moiety of the profits instead of a salary; the names of both were painted on the office door, and bills for business were

(c) If any attorney or solicitor shall wilfully and knowingly act as agent in any action or suit in any court of law or equity, or matter in bankruptcy, for any person not duly qualified to act as an attorney or solicitor as aforesaid, or permit or suffer his name to be anyways made use of in any such action, suit, or matter upon the account or for the profit of any unqualified person, or send any process to such unqualified person, or do any other act thereby to enable such unqualified person to appear, act, or practise in any respect as an attorney or solicitor in any suit at law or in equity, knowing such person not to be duly qualified as aforesaid, and complaint shall be made thereof in a summary way to any of the said superior courts wherein

such attorney or solicitor has been admitted, and proof made thereof upon oath to the satisfaction of the court that such attorney or solicitor hath wilfully and knowingly offended therein as aforesaid, then and in such case every such attorney or solicitor so offending shall and may be struck off the roll, and for ever after disabled from practising as an attorney or solicitor; and in that case, and upon such complaint and proof made as aforesaid, it shall and may be lawful to and for the said court to commit such unqualified person so acting or practising as aforesaid to the prison of the said court, without bail or mainprize, for any term not exceeding one year. *Id.* s. 32. See sect. 45, *ante*, p. 49, n.

made out and delivered in their joint names : the court held this to be a case within the statute, as the attorney had allowed his name to be used upon the account and for the profit of an unqualified person ; and they ordered the attorney to be struck off the rolls, and the other person to be committed to prison for a month. *Re Jackson & Wood*, 1 B. & C. 270. And see *Re Clark et al.*, 3 D. & R. 260. But where a bailiff wrote to an attorney for writs, which the latter sent, without knowing any thing of the parties or circumstances ; but it appeared that the bailiff never represented himself or had been considered as an attorney, nor did he look for any profits on the law proceedings : the court held this not to be a case within the statute, but that it was a most improper practice, which the court, in virtue of its general jurisdiction over attornies, would punish severely. *Ex p. Whatton*, 5 B. & A. 824. Also, where an attorney, whose certificate was not taken out for one year, owing to the omission of his agent, but was taken out for the next, continued notwithstanding to practise : the court held that he was not an unqualified person within the meaning of the statute, and that an agent who, knowing of the fact, acted for him, was not therefore liable to be struck off the rolls. *Re Hodgson & Ross*, 1 Har. & W. 265, 4 Nev. & M. 763. Cases of this kind are usually referred to the master, and upon his report the court act. However, it is open to either party, to argue the matter before the court upon the facts reported ; and in one case the court allowed the unqualified party to bring the whole case under their consideration, when brought up to be committed. *Re Jaques*, 2 D. & R. 64.

When an attorney has thus allowed an unqualified person to act in his name, no action can be maintained against the client for the amount of the business done : no such action can be sustained by the attorney, *Hopkinson v. Smith*, 1 Bing. 13, and certainly not by the unqualified person.

*Attorney, prisoner.*] An attorney, who is a prisoner within any prison or the rules thereof, shall not commence, prosecute, or defend any action, as attorney, in his own name or in the name of another, on pain of punishment as for contempt of the court in which the proceeding shall be ; and any attorney allowing him to use his name for such purpose, is liable also to the same punishment (d). This, however, does not extend

(d) No attorney or solicitor, who shall be a prisoner in any gaol or prison, or within the limits, rules, or liberties of any gaol or prison, shall or may, during his confinement in any gaol or prison, or within the limits, rules, or liberties of any gaol or prison, as an attorney or solicitor, in his own name

or in the name of any other attorney or solicitor, sue out any writ or process, or commence or prosecute or defend any action or suit, in any courts of law or equity, or matter in bankruptcy ; and such attorney or solicitor so commencing, prosecuting, or defending any action or suit as afore-



to suits commenced after his imprisonment, at his own suit. *Kaye v. Denew*, 7 T. R. 671. But entering a plaint, and suing out process, in a county court, was holden to be within the former act upon this subject. *Re Flint*, 1 B. & C. 254.

An attorney who is in prison for debt, is not entitled to his privilege of not being holden to bail; and may be detained upon meane process. *Byles v. Wilton*, 4 B. & A. 88.

*Privileges of attorneys.*] Attornies are privileged from giving (indeed they will not be permitted to give) evidence of any matters confided to them by their client, in their professional capacity, *Gill. Ev.* 136. *Arch. Pl. & Ev.* 474. And see *Wheatley v. Williams*, 1 Mees. & W. 533. *Turquand et al. v. Knight*, 2 Id. 98. *Gillard v. Bates*, 6 Id. 547. *Perry et al. v. Smith*, 11 Law J., 269, ex. *Doe v. Watkins*, 3 Bing. N. C. 421, whether a suit be depending or in contemplation at the time, or not. *Doe v. Harris*, 5 Car. & P. 592. But the communication must have been made to him as the attorney of the party; and therefore where the same attorney was employed by the vendor and purchaser of an estate, an application to him by his client, the purchaser, asking a further time for payment of the purchase money, was holden not to be a privileged communication. *Perry et al. v. Smith*, 9 Mees. & W. 681. And see *Shore v. Bedford*, 12 Law J., 138, cp. This is rather the privilege of the client than of the attorney. So, he cannot be compelled to produce the deeds or documents of his client in his possession. See *Bate v. Kinsey*, 1 Cr. M. & R. 38. *Davies v. Waters*, 1 Dowl. N. C. 651, 11 Law J., 214, ex. But he may be asked whether such deeds or documents are not in his possession, in order that secondary evidence may be given of them, if he refuse to produce the originals. *Coates et al. v. Birch*, 2 Ad. & El. N. C. 252. So, where he is the attesting witness to a deed executed by his client, his privilege does not exempt him from giving evidence of the execution. *Doe d. Avery v. Roe*, 6 Dowl. 518. In what cases he shall, if required, disclose the residence of his client, see stat. 2 W. 4, c. 39, s. 17, post, p. 69.

An attorney, if plaintiff, has a right to bring his action in the court of which he is an attorney, *Lewis v. Kerr*, 2 Mees. &

said, and any attorney or solicitor permitting or empowering any such attorney or solicitor as aforesaid to commence, prosecute, or defend any action or suit in his name, shall be deemed to be guilty of a contempt of the court in which any such action or suit shall have been commenced or prosecuted, and punishable by the said courts accordingly, upon the application of any person complaining thereof; and such attor-

ney or solicitor so commencing, prosecuting, or defending any action or suit as aforesaid shall be incapable of maintaining any action or suit at law or in equity for the recovery of any fee, reward, or disbursement, for or in respect of any business, matter, or thing done by him, whilst such prisoner as aforesaid, in his own name or in the name of any other attorney or solicitor. *Id.* s. 31.

*W.* 226, and to lay and retain his venue in Middlesex, no matter where he is resident; *Pye v. Leigh*, 2 *W. Bl.* 1065; and it is no ground for changing the venue in such a case, that the witnesses on both sides reside in the county to which the venue is sought to be changed. *Pilcher v. Sh. of Monmouth*, 2 *Marsh.* 152. But if he lay the venue in a different county, the court will not afterwards allow him to amend, by changing the venue to Middlesex. *Lewis v. Shelley*, 7 *Taunt.* 146. And see *Mounsey v. Watson*, 7 *B. & C.* 683. *Bradshaw v. Burton*, 7 *Dowl.* 329. So, if he employ another attorney to bring the action for him, he thereby waives the privilege of retaining the venue in Middlesex. *Harrington v. Page*, 2 *Dowl.* 164.

An attorney, when defendant, has no privilege as to venue, and therefore cannot change the venue to Middlesex, *Yearly v. Roe*, 3 *T. R.* 573. *Pope v. Redfearne*, 4 *Burr.* 2027, unless the cause of action accrued there. But he is privileged from arrest upon *meane process*. *Post*, p. 134. And see *Pitt v. Pocock et al.*, 2 *Cr. & M.* 146. He has the privilege also of being sued only in that court of which he is an attorney, *Duffy v. Oakes*, 3 *Taunt.* 166, and see *Stokes v. Mason*, 9 *East*, 424. *Percival v. Cooke*, 5 *Mees. & W.* 293. *Prior et al. v. Smith*, 6 *Dowl.* 299, even although he be sued as bail; *Harper v. Tuhourdin*, 6 *M. & S.* 383; if sued in any other court, he may plead his privilege, *Hunter v. Neck*, 10 *Law J.*, 297, *cp.*, and he may plead it by attorney. *Groom v. Wortham*, 12 *Law J.*, 88, *cp.* And the uniformity of process act makes no alteration in the law, in this respect. *Lewis v. Ker*, 5 *Dowl.* 447, 327, and see *Tomkins v. Chilcote*, 2 *Dowl.* 187. But if the plaintiff also be an attorney, and have the privilege of bringing his action in another court, the defendant in that case cannot plead his privilege; for the privilege of the plaintiff attaches first, and privilege cannot be set up against privilege. *Danser v. Berryman*, 2 *W. Bl.* 1325.

An attorney, plaintiff, is not obliged to sue in a court of requests, for a debt, unless his privilege in that respect be taken away by express words in the statute creating or regulating the court. *Johnson v. Bray*, 2 *Brod. & B.* 698, and see *Board v. Parker*, 7 *East*, 46. And the uniformity of process act has made no difference in this respect. *Dyer v. Levi*, 1 *Har. & W.* 640, 4 *Dowl.* 630. *Wright v. Skinner*, 1 *Mees. & W.* 144.

So an attorney, as defendant, cannot be sued in a court of requests, unless his privilege in that respect be taken away by express words in the statute creating or regulating the court. *Gardner v. Jessop*, 2 *Wils.* 42. *Wiltshire v. Lloyd*, 1 *Doug.* 381.

Another privilege an attorney enjoys is, that when he is party to an action, and obtains a verdict or judgment, he is

entitled not merely to the costs that any other party suing or defending in person should have, but to the same costs as if he were merely attorney in the cause. He is even entitled to the usual fee for his attendance at the trial, *Jervis v. Dewes*, 4 *Dowl.* 764, if his attendance there were necessary. See *Leaver v. Whalley*, 2 *Dowl.* 80. *Parsloe v. Foy*, 2 *Dowl.* 181.

It may be necessary to add here, that an attorney does not lose his privilege, by not taking out his certificate at the expiration of his former one, *Skirrow v. Tagg*, 5 *M. & S.* 281, or within the time limited by statute.

Attornies, whilst they continue to practise, cannot be justices of the peace of counties (e); but they may, of cities or towns, being counties of themselves, or of towns, &c., having justices by charter, commission, &c. (f.)

## 2. Their employment and duties.

*Suing and defending by attorney.*] All persons may sue or defend by attorney, *St. Westm.* 2d. (13 Ed. 1,) c. 10, except married women when sued alone, infants and idiots. Infants must sue by their next friend or guardian; they must defend by guardian. Married women, when sued alone, must appear in person. Idiots must appear in person, and then any person who may pray to be admitted to sue or defend for them, shall be allowed to do so; but a lunatic must appear by guardian if within age, or by attorney if of full age. 4 *Co.* 124, *Benvenley's case*.

Formerly, the authority given to an attorney to sue or defend, was in writing, and called a warrant; and it was always entered of record. These warrants have long ceased to be usual in practice; it is, however, but recently that the entry of them upon the roll has been abolished. *R. G. H.* 4 *W.* 4, r. 2, s. 4, and see *R. C. P.*, *H.* 1 *Vict.* It is still, however, in some cases prudent to have a written authority from the client, particularly where there is the slightest fear of the

(e) No attorney or solicitor shall be capable to continue or be a justice of the peace for any county within that part of Great Britain called England, or the principality of Wales, during such time as he shall continue in the business and practice of an attorney or solicitor. *Id.* s. 33.

(f) The prohibition last hereinbefore contained, shall not extend or be construed to extend to any city or town being a county of itself, or to any city, town, cinque

port, or liberty having justices of the peace within their respective limits and precincts by charter, commission, or otherwise, but that in every such city, town, liberty, and place, attornies or solicitors may be capable of being justices of the peace, and in such manner only as they might have been if this act had never been made, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding. *Id.* s. 34.

client afterwards denying the retainer. There is no particular form required; and it may be comprised in a very few words. Where the assignee of a debt, gave his attorney authority to sue for it in the assignor's name, the authority was deemed sufficient. *Pickford v. Ewington*, 4 Dougl. 453. In affidavits made by attorneys for parties to a cause, they always describe themselves as the attorneys for such parties, in order to show to the court that they are retained, and that the court may accordingly know how to deal with their statements. See *Volet v. Waters*, 3 D. & R. 55. If, however, it turn out that an attorney has sued without authority, the court will not set aside the proceedings, unless it appear that the attorney is insolvent. *Stanhope v. Firmin, et al.*, 3 Bing. N. C. 301. See *Hammond v. Thorpe*, 1 Cr. M. & R. 64. *Carman v. Edwards et al.*, 9 Car. & P. 596. *Anon.* 1 Chit. 193 (a.)

By stat. 2 W. 4, c. 39, s. 17, "every attorney whose name shall be indorsed on any writ issued by authority of this act, shall, on demand in writing made by or on behalf of any defendant, declare forthwith whether such writ has been issued by him, or with his authority or privity; and if he shall answer in the affirmative, then he shall also, in case the court or any judge of the same or any other court shall so order and direct, declare in writing, within a time to be allowed by such court or judge, the profession, occupation, or quality, and place of abode of the plaintiff, on pain of being guilty of a contempt of the court from which such writ shall have appeared to have issued; (see *Johnson v. Birley*, 5 B. & A. 540. *Hayes v. Carr*. 11 Law J., 111, cp. *Smith v. Bond*, 11 Mees. & W. 326, 12 Law J., 343. ex.) and if such attorney shall declare that the writ was not issued by him, or with his authority or privity, the said court, or any judge of the said courts, shall and may, if it shall appear reasonable so to do, make an order for the immediate discharge of any defendant or defendants who may have been arrested on any such writ, on entering a common appearance." This section however extends, not merely to bailable, but to nonbailable writs also. *Gilson v. Carr*. 4 Dowl. 618. And by R. G. M. 3 W. 4, "if any attorney shall, as required by the said act, declare that any writ of summons or capias, upon which his name is indorsed, was not issued by him, or with his authority or privity, all proceedings upon the same shall be stayed until further notice."

It may be useful to mention here, that although an attorney's undertaking to carry on a suit, is an entire contract to carry it on to its termination, and can be determined by the attorney only upon reasonable notice: see *Harris et al. v. Osbourn*, 2 Cr. & M. 629: yet an attorney who has undertaken a cause, is not bound to proceed in it without adequate advances from time to time by his client, for expenses out of pocket; and therefore, the court will not compel an attorney, even after no-

tice of trial, to carry the cause into court, unless the client supply him with the necessary funds for that purpose. *Wadsworth v. Marshall*, 2 *Crompt. & J.* 665. And if the client fail to supply him with such funds, he may decline proceeding any further in the suit, and may maintain an action against his client for the costs already incurred; *Vansandau & Tindale v. Brown*, 1 *Dowl.* 715; although after such refusal, he cannot perhaps retain the papers in the cause, upon the ground of having a lien upon them, until the costs are paid. *Id.* Still, however, an attorney cannot in such a case abandon a suit, without giving a reasonable notice to his client of his intention to do so, nor can he maintain an action for the costs already incurred. *Nicholls v. Wilson*, 12 *Law J.*, 266 *ex.*, 2 *Dowl. N. C.* 1031. And therefore, where an attorney, only five days before the commencement of the assizes, gave notice to his client that he would not deliver briefs to counsel, unless he were furnished with funds for the purpose, and such funds not being furnished, counsel were not instructed, and a verdict was given against the client: in an action against the attorney for negligence, the court held that the jury were properly directed to find for the plaintiff, if they thought the attorney had not given reasonable notice to the client of his intention to abandon the cause. *Hoby v. Buitt*, 3 *B. & Ad.* 350.

*Change of an attorney.*] No person shall change his attorney, without a rule of court or judge's order for that purpose, and notice thereof to the adverse party or his attorney; and the new attorney shall take notice, at his peril, of the rules whereunto the former attorney was liable. *R. M.* 1654, s. 10, *K. B.*; *R. M.* 1654, s. 13, *C. P.* And the practice is the same in the Exchequer. *Daz.* 28. *May v. Pike*, 4 *Mees. & W.* 197. See *Macpherson v. Robinson*, 1 *Doug.* 217. Therefore where a defendant appeared to an action by one attorney, it was holden that he could not afterwards make an application to the court by another, without having obtained an order to change the first. *Ginders v. Moore*, 1 *B. & C.* 654. So, if a defendant give notice of bail by one attorney, and then, without any order to change that attorney, give notice of justification by another, this is a good objection to their justifying. *Hill v. Roe*, 6 *Taunt.* 532. But where a defendant, upon being arrested, employed an attorney to put in bail, and afterwards employed another to carry on the proceedings generally; and both attorneys put in bail; the last set of which the plaintiff treated as a nullity, but to the first set he excepted; and the first set not justifying, he obtained an attachment against the sheriff: the court held that he could not treat either set of bail as a nullity, and they accordingly set aside the attachment. *Gilmour v. Brindley*, 7 *D. & R.* 259. Also, where notice of bail was given by the defendant's attorney, and the bail to the sheriff also put in bail above by another attorney, without any order to change: this was

holden to be perfectly regular. *R. v. Sh. of London*, 2 B. & A. 604. Also, as the action is deemed to be completed by judgment, it has been holden that, after judgment, the parties may have the further proceedings, such as suing out execution, *Topping v. Johnson*, 2 B. & P. 357, moving to set aside the judgment, *Doe v. Bransom*, 6 Dowl. 490, bringing a writ of error, *Batchelor v. Ellis*, 7 T. R. 337, entering satisfaction on the roll, *Marr v. Smith*, 4 B. & A. 466, and the like, conducted by a different attorney from the one retained in the action, without any order to change the attorney.

The order is drawn up, upon payment to the former attorney of whatever may be due to him for the costs already incurred in the action, unless there be some reason to the contrary. And the order must not only be drawn up, but served on the attorney of the opposite party, before the new attorney can safely take any step in the action. *R. v. Sh. of Middlesex*, 2 Dowl. 147. See *Lovegrove v. Dymonds*, 4 Taunt. 669. On the other hand, the opposite party must object, in the first instance, to a proceeding by a new attorney without such an order; for if he treat that proceeding as regular, and act upon it, it will be a waiver of the order and service altogether. *Margerum v. Mackilwaine*, 2 New R. 509, and see *Parley v. Hebbes*, 3 Dowl. 538.

After an attorney is thus discharged, there is no legal objection to his being employed by the opposite party, unless perhaps a strong case be made out, to show that he was discharged for misconduct, and that he possesses secrets of his client, the knowledge of which by the opposite party would seriously affect the client's interest. *Johnson et al. v. Marriott*, 2 Cr. & M. 183.

Also, upon the death of an attorney in the cause, notice must be given to the opposite party of the appointment of the new attorney, before the latter can take any proceeding. *Ryland v. Noakes*, 1 Taunt. 342. If the London agent, however, be the attorney on the record, the death of the country attorney will not affect his right to proceed in the action. *Taunton v. Goforth*, 6 D. & R. 384.

*Service of rules, notices, &c. upon attorneys.*] Where the attorney in a cause resides or has his chambers in London or Westminster or within ten miles thereof, all "notices, summonses, orders, and rules [and all other proceedings, *Blackburn v. Peat*, 2 Dowl. 293] which do not require personal service, shall be deemed sufficiently served upon him, if a copy thereof shall be left at the place lastly entered in the book at the master's office, (mentioned *ante*, p. 58), with any person resident at or belonging to such place; and if such attorney shall neglect to make such entry, then the fixing up of any notice, or the copy of any summons, order or rule, for such attorney, in the said master's office, (see *Davies v. Jenner*,

9 *Dowl.* 45,) shall be deemed sufficient service, where a personal service is not required." *R. H.* 8 *G.* 3, *K. B.* And there is the like rule in the Exchequer. *R. M.* 1 *W.* 4, *Exch.* See *Blackburn v. Peat*, 2 *Dowl.* 293. In country causes, the London agents always serve and are served with all the notices, rules, pleadings, &c. in the course of the cause, on both sides.

By *R. G. H.* 2 *W.* 4, s. 50, "service of rules, orders and notices, if made before nine at night, shall be deemed good; but not if made after that hour."

*Clients, how far bound by the acts of their attorneys.*] By all acts done by an attorney within the scope of his authority, his client is bound. He is bound even by the acts of the attorney's agent. *Griffiths v. Williams*, 1 *T. R.* 710. Where a party is sued for a debt, payment of it to the plaintiff's attorney, is the same as payment to the plaintiff himself, and the attorney's receipt binds the client; *Yates v. Freckleton*, 2 *Doug.* 623; but his authority does not extend to discharge a defendant in execution at the suit of his client, without his client's consent, or without receiving from him the amount of the debt. *Savory v. Chapman*, 9 *Law J.*, 186, *qb.* If an attorney in a cause at nisi prius, consent to refer it to arbitration, his client is bound by the reference. *Filmer v. Delber*, 3 *Taunt.* 486. But where the attorneys in a cause signed an agreement that the record should be withdrawn upon certain terms, some things to be done by the plaintiff, some by the defendant, and that the defendant's costs should be taxed by certain persons as between attorney and client: it was holden that in this the defendant's attorney had exceeded his authority, and that his client was not bound by the arrangement. *Iveson v. Corington*, 2 *D. & R.* 207, 1 *B. & C.* 160, and see *Lewis v. Earl of Tankerville*, 12 *Law J.*, 234, *ex.*

*Undertakings of attorneys.*] If an attorney undertake in writing to appear for a defendant, he must do so, otherwise the court will punish him by attachment. See *R. M.* 1654, *K. B.*; *R. M.* 1654, s. 13. *C. P.* *Mould v. Roberts*, 4 *D. & R.* 719. *Stratton v. Burgess*, 1 *Str.* 114. *Morris v. James*, 6 *Dowl.* 514. See also *R. G. H.* 2 *W.* 4, s. 31. The practice is the same in the Exchequer. *Dax*, 28, 29. But a previous request is necessary, and a refusal or neglect to comply with it, before the court will grant the attachment. *Jacob v. Magnay*, 12 *Law J.*, 93, *qb.*

So, where an attorney in a cause gives an undertaking for his client, the court will enforce it as against the attorney, by attachment, whether the matter of it were within the scope of his authority or not. *Iveson v. Corington*, 1 *B. & C.* 160, 2 *D. & R.* 207. As, where the attorney in an action undertakes to pay the debt and costs for his client, the court of which he is an attorney, will enforce the payment by attachment, even

although such undertaking be not in writing, and therefore void by the statute of frauds. *Evans v. Duncomb*, 1 Tyr. 283, 1 *Crompt. & J.* 372. *Re Paterson*, 1 *Dowl.* 468. So, where an attorney had the proceedings in an action stayed, upon an undertaking to pay the costs, the court held that he was bound to fulfil his engagement, although his client had since died. *Hellings v. Jones*, 3 *Bing.* 70. So, where the solicitor for the London creditors of a bankrupt in the country, undertook on their behalf to pay a portion of certain expenses, to be incurred in opposing a proof under the commission, the court held him personally liable under his undertaking. *Hall v. Ashurst*, 4 *Crompt. & M.* 714. So, where an attorney attending and prosecuting a commission of lunacy, promised the under-sheriff to pay the fees due to him, the commissioners and jury, upon the commission being returned, but failed to do so: the court of Queen's Bench granted a rule ordering him to pay the amount, upon the ground that when his undertaking was accepted, credit was given to him in his professional character. *Ex p. Bodenham*, 8 *Ad. & El.* 959. And the same, as to undertakings for other purposes. See *Ex p. Hughes*, 5 *B. & A.* 482. But the court will thus interfere summarily to enforce such undertakings, only in cases where the attorney was at the time attorney in the action or other proceeding in which it was given; *Walker v. Arlett*, 1 *Dowl.* 61. *Ex p. Watts*, *Id.* 512. *Re Bateman*, 2 *Dowl.* 161; in all other cases, they will leave the party to his action. See *Ex p. Evans*, 9 *Dowl.* 106. Even where the attorney for the lessors of plaintiff in an ejectment, gave a written indemnity to a person, for allowing his name to be used as one of the lessors, Littledale, J. refused to enforce it by attachment, but left the party to his remedy by action. *Ex p. Clifton*, 5 *Dowl.* 218. So, where the plaintiff, who was an attorney, gave his undertaking to indemnify a sheriff under an execution, Taunton, J. refused to enforce it by attachment. *Northfield v. Orton*, 1 *Dowl.* 415. So, where the undertaking was given in a proceeding in Chancery, the court of Queen's Bench refused to enforce it. *Re Garland*, 6 *Dowl.* 512. If the undertaking be attested, there must be an affidavit of the attesting witness, amongst others, to ground any application upon it. *Ex p. Hasleham*, 1 *Dowl. N. C.* 792.

### 3. Their remedy, &c. for costs.

*Delivery of their bill.*] An attorney makes out and delivers his bill, either voluntarily, with a view of bringing an action upon it; or he is required to do so by a judge's order, with a view that the client may have it referred for taxation.

1. No attorney or solicitor shall commence or maintain an action or suit, for the recovery of any fees, charges, or dis-



bursements, for any business done by him, until the expiration of one month or more after such attorney or solicitor respectively shall have delivered unto the party to be charged therewith, (*see Painter v. Linsell*, 8 Dowl. 250,) or sent by the post to, or left for him, her or them, at his, her or their counting-house, office of business, dwelling-house or last place of abode, a bill of such fees, charges, and disbursements; which bill shall be subscribed with the proper hand of such attorney or solicitor, or in the case of partners, by one of them, or be accompanied by a letter so signed, and referring to the bill. 6 & 7 Vict. c. 73, s. 37.(g)

The month here mentioned is a calendar month, 6 & 7 Vict. c. 73, s. 48, and reckoned exclusively of the day on which the bill is delivered, and of the day on which the action is commenced. *Blunt v. Heslop*, 8 Ad. & El. 577.

The former statute upon this subject required this delivery of a bill only in cases where the demand of the attorney consisted of fees, charges and disbursements, "*at law or in equity*;" and therefore the business must have been such as either actually or in contemplation of law, was done in a court of law or equity, to require a bill thus to be delivered before action brought. It was therefore holden that the statute did not extend to fees for advice or attendance after the suit was over, *Pepper v. Yeatman*, 5 Dowl. 155, 2 Har. & W. 116, or to business done in parliament, *Williams v. Odell*, 4 Price, 279, or to drawing an affidavit of petitioning creditor's debt, and bond to the lord chancellor, in order to obtain a commission of bankrupt, the affidavit never having been sworn, nor the commission sued out, *Burton v. Chatterton*, 3 B. & A. 486, or to business done under a fiat in bankruptcy, *Hamilton v. Pitt*, 7 Bing. 232.

(g) No attorney or solicitor, nor any executor, administrator, or assignee of any attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor, until the expiration of one month after such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling house, or last known place of abode, a bill of such fees, charges, and disbursements, and which bill shall either be subscribed with the proper hand of such attorney or solicitor, (or, in case of a partnership, by

any of the partners, either with his own name or with the name or style of such partnership,) or of the executor, administrator, or assignee of such attorney or solicitor, or be enclosed in or accompanied by a letter subscribed in like manner referring to such bill. Provided that it shall be lawful for any judge of the superior courts of law or equity to authorize an attorney or solicitor to commence an action or suit for the recovery of his fees, charges, or disbursements against the party chargeable therewith, although one month shall not have expired from the delivery of a bill as aforesaid, on proof to the satisfaction of the said judge that there is probable cause for believing that such party is about to quit England. *Id.* s. 37.

*Crowder v. Davis*, 3 Y. & J. 433. *Harper v. Williams*, 10 Law J., 189, cp., 9 Doucl. 618. and see *Finchett v. Howe*, 2 Camp. 278, but see *Collins v. Nicholson*, 2 Taunt. 321, or to business done in a court of requests, or in any other court in which there was no taxing officer; *Becke v. Wills*, 1 Crompt. & M. 75; or to preparing the acknowledgments of married women, since the abolition of fines and recoveries. *Re Branson*, 3 Bing. N. C. 783. So, fees for searching any of the public law-offices were not within the meaning of the statute. *Exp. Bowles*, 1 Hodg. 143, 1 Bing. N. C. 632. *Penton v. Correa*, 1 Ry. & M. 262. But the present statute has purposely omitted these words "at law and in equity," and therefore extends to all bills for fees, charges, and disbursements for any business done by an attorney or solicitor, whether in court, or not.

And even for fees, &c. within the former statute, if an action were commenced by the executor or administrator of the attorney, *Barrett v. Moss*, 1 Car. & P. 3, and see *Penson v. Johnson*, 4 Taunt. 724, or by the assignee under his insolvency, *Lester v. Lazarus*, 2 Cr. M. & R. 665, it was not necessary previously to deliver a bill. But by the present act, the executor or assignee must deliver a bill signed, &c. in the same manner as the attorney himself would have been obliged to do, if he were about to sue. See *ante*, p. 74 n. (g).

The present act also extends to agents, as well as to other attorneys.

Also, where an action is brought against an attorney, and he wishes to set off a bill for business done, he must in like manner deliver it; but it is not necessary to do so a month before pleading or trial; if he do it a reasonable time before the trial, so as to give the plaintiff a sufficient opportunity to have it taxed, if he shall think fit, it will be sufficient. *Murphy v. Cunningham*, 1 Anst. 198. *Bulman v. Birket*, 1 Esp. 449.

2. What we have already said relates to cases where the attorney has voluntarily delivered his bill. But the court or a judge may order an attorney to deliver his bill, upon the application of the client (A). So, where a third party is liable to pay an attorney's bill, either to him or his client, the court or a judge may order the attorney to deliver to him a copy of the bill, upon paying for it (i).

(A) It shall be lawful for the said respective courts and judges, in the same cases in which they are respectively authorized to refer a bill which has been so as aforesaid delivered, sent, or left, to make such order for the delivery by any attorney or solicitor, or the executor, administrator, or assignee of any attorney or solicitor, of such bill as aforesaid, and for the delivery up of deeds,

documents, or papers in his possession, custody, or power, or otherwise touching the same, in the same manner as has heretofore been done as regards such attorney or solicitor, by such courts or judges respectively, where any such business had been transacted in the court in which such order was made. *Id.* s. 37.

(i) After enacting that where a person, not being the party charge-

*Action.*] Where it is necessary to deliver an attorney's bill, previously to bringing an action against the client for the amount of it, the action must not be commenced until after the expiration of a calendar month from the delivery of the bill. *Ante*, pp. 73, 74. Also, if a judge's order have been obtained to tax the bill, the action cannot be commenced pending the taxation; 6 & 7 *Vict. c. 73, s. 37, post. Sheriff v. Gresley*, 5 *Nev. & M.* 491; but it may, immediately after taxation, even pending an application as to the costs. *Hewitt v. Bellott*, 2 *B. & A.* 745.

The writ is in the ordinary form, on promises. The declaration also is in the ordinary form, in assumpsit, for work and labour as an attorney, &c., with a count for money paid, when necessary, and a count upon an account stated.

Most defences, except that of a denial of the retainer, or a denial of the business having been done, must be pleaded specially, as we shall have occasion to state more fully presently. Where in an action on an attorney's bill, a regular interlocutory judgment being set aside on an affidavit of merits, the defendant pleaded, not only the general issue, but also two special pleas, namely, that the plaintiff had not taken out his certificate, and that he had not delivered a signed bill one month before action brought; a judge at chambers, upon application, made an order, that the defendant should be confined to the plea of the general issue only; and upon a motion to set aside that order, the court held that the judge had done rightly, as the pleas did not raise a defence, to which the defendant ought to be let in, after an affidavit of merits; and the rule was therefore discharged with costs. *Holmes v. Grant*, 1 *Gale*, 59.

The plaintiff, under the general issue, must prove—*First*, his retainer by the defendant, by proving the defendant's handwriting to a written retainer, if there be one; or by proving that the defendant came frequently to the plaintiff's office, during the time the business was carrying on, and gave directions about it; or by proving other circumstances, from which

able with the bill, shall be liable to pay or shall have paid it either to the attorney or to the party chargeable, the court or a judge, upon the application of such third party, may order the bill to be taxed, (s. 38), it is enacted, by sect. 40, "that for the purpose of any such reference upon the application of the person not being the party chargeable within the meaning of the provisions of this act as aforesaid, or of a party interested as aforesaid, it shall be lawful for such court or judge to

order any such attorney or solicitor, or the executor, administrator, or assignee of any such attorney or solicitor, to deliver to the party making such application a copy of such bill, upon payment of the costs of such copy: Provided always, that no bill which shall have been previously taxed and settled shall be again referred, unless under special circumstances the court or judge to whom such application is made shall think fit to direct a re-taxation thereof. *Id.* s. 40.

the jury may presume a retainer. If the business were done in a suit to which the defendant was not a party, yet if it were for the defendant's benefit, a written retainer is not necessary. If, for instance, bail to the sheriff employ an attorney to put in bail above, they are liable for the expenses, *Hector v. Carpenter*, 1 Stark, 190, and a written retainer is not necessary. As to joint retainers, see *Hellings v. Gregory*, 1 Car. & P. 627. *Fawcett v. Weathall*, 2 Car. & P. 305. *Starving v. Cousins*, 1 Gale, 159. Secondly, the delivery of a signed bill, if the defendant have specially pleaded that no such bill was delivered: this is done, by proving that a bill, subscribed in the manner mentioned *ante*, p. 74, n (g), or inclosed in or accompanied by such letter as there mentioned, was delivered, sent or left, as there directed; it is unnecessary, in the first instance, to prove the contents of the bill. 6 & 7 Vict. c. 73, s. 37 (j). That the action was not commenced until after the lapse of a month from the delivery of the bill, will appear sufficiently upon the face of the *nisi prius* record. See *Webb v. Pritchett*, 1 B. & P. 263. Thirdly, that the business charged for was done; this is allowed to be proved by general evidence, because the defendant had an opportunity of having the bill referred for taxation, which would have enabled him to contest before the master the fact of the business being done. Fourthly, as to the reasonableness of the charges: if the bill have not been taxed, the defendant will not be allowed at the trial to contest the charges of the different items, as he might have done that out of court, if he were not satisfied that the charges were reasonable; *Anderson v. May*, 2 B. & P. 237. *Williams v. Frith*, 1 Doug. 189; *Hooper v. Till*, 1 Doug. 198; although in such a case it is usual to give general evidence of the reasonableness of the charges. But if the bill have been taxed, then the jury will be directed to give a verdict for the amount of the taxation. See *Lee v. Jones*, 2 Camp. 496. *Beck v. Cleaver*, 9 Dowl. 111. It may be necessary to mention, that a bill delivered is deemed conclusive evidence against an increase of charge in a subsequent bill, on any of the items contained in it, and strong presumptive evidence against any additional items. *Loveridge v. Botham*, 1 B. & P. 49. Where a verdict was taken by consent for the amount of the bill, subject to

(j) It shall not in any case be necessary in the first instance for such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, in proving a compliance with this act, to prove the contents of the bill he may have delivered, sent, or left, but it shall be sufficient to prove that a bill of fees, charges, or disbursements, subscribed in

the manner aforesaid, or inclosed in or accompanied by such letter as aforesaid, was delivered, sent, or left in manner aforesaid; but nevertheless it shall be competent for the other party to show that the bill so delivered, sent, or left was not such a bill as constituted a *bond fide* compliance with this act. *Id.* s. 37.

taxation within the first five days of the following term, and the defendant omitted to take measures to have the bill taxed within the time: the court held the plaintiff to be entitled to sign his judgment in the ordinary way, and to tax his costs of the action. *Tucker v. Neck*, 6 Dowl. 231.

As to the defence: it will be a good defence, that a bill was not delivered in the manner and within the time appointed by the statute, before the action was brought. But this defence must be specially pleaded: the defendant cannot give it in evidence under the general issue. *Lane et al. v. Glenney*, 7 Ad. & El. 83. *Robinson v. Roland*, 6 Dowl. 271.

That the business was done at a time when the plaintiff was uncertificated, will also be a good defence. 6 & 7 Vict. c. 73, s. 26, *ante*, p. 58, n (y). This also, it should seem, ought to be specially pleaded. See *Williams v. Jones*, 2 Ad. & El. N. C. 276. And see *Nash v. Goode et al.*, 9 Dowl. 929.

Formerly if the business were done in the plaintiff's name, in a court of which he was not then an attorney, it would have been a good defence to the action, see *Latham v. Hyde*, 1 Crompt. & M. 128, if specially pleaded. *Hill et al. v. Sydney*, 7 Ad. & El. 956. The law in that respect was altered by stat. 1 Vict. c. 56, s. 4; but that statute is now repealed by stat. 6 & 7 Vict. c. 73, s. 1, sch. 1; and it should seem therefore that this is now a good defence.

That the business, although done in the name of the plaintiff, was really done, wholly or in part, for the benefit of an unqualified person, will also be a good defence to the action. *Hopkinson v. Smith*, 1 Bing. 13. See *ante*, p. 63.

That the business charged for, proved wholly useless to the client, whether arising from gross negligence or ignorance, or from inadvertence or inexperience only, of the attorney, will also be a good defence; *Hill v. Featherstonhaugh*, 7 Bing. 569, *Bracey v. Carter*, 12 Ad. & El. 373; and see 1 Dowl. 705. 2 Id. 62. *Cliffe v. Prosser*, 2 Id. 21; but not, where the negligence, &c., has been merely injurious, see *Templer v. M'Laghlan*, 2 New R. 136. *Johnson v. Alton*, 1 Camp. 176. *Pasmore v. Birnie*, 2 Stark, 59, or where it has not been the sole cause of the proceedings being useless. *Dax v. Ward*, 1 Stark. 409. This defence may be given in evidence under the general issue. *Hill v. Allen*, 2 Mees. & W. 283. ——— v. *Bulwer et al.*, 9 Law J., 52, *cp.*

So, it is a good defence that the legal proceeding, in which the costs were incurred, is not yet completed or determined; or that the plaintiff discontinued the action or proceeding, without giving the plaintiff any notice of it, unless very satisfactory reasons be given for his having done so. *Nicholls v. Wilson*, 11 Mees. & W. 106.

The defendant may also set up as a defence that the plaintiff agreed to do the business, without charging him anything for

the same, see *Ashford v. Price*, 3 Stark. 185, or upon such other terms as may form a defence to the action.

The verdict and subsequent proceedings are the same as in ordinary cases.

*Lien for costs.*] An attorney has a lien upon all deeds and papers of his client in his hands, to the extent of the general balance due to him from the client for costs. *Howell v. Harding*, 8 East, 362. Even where the client gave his attorney a sum of money to pay off an execution, and the execution creditor upon being paid delivered up to the attorney a lease which had been deposited with him by the client as a security for the debt: the court held that the attorney had a lien upon the lease, for the general balance of costs due to him by the client, and that such lien was not extinguished by his having taken the acceptances of his client for the amount of that balance, some of which were dishonoured at the time the lease came into his hands. *Stevenson v. Blakelock*, 1 M. & S. 535. So, where a mortgagee placed the title deeds in the hands of his attorney, and the estate was afterwards sold, it was holden that the attorney was not bound to give up the deeds to the purchaser, until he was paid the amount of the costs due to him from the mortgagee. *Ogle v. Story*, 1 Nev. & M. 474. So, where the client became bankrupt, the court held that the attorney had a lien upon all deeds and papers in his hands, as against the assignees, not merely for the amount of his bill for business done before the bankruptcy, but also for the costs of an action brought by him afterwards against the bankrupt for the amount of his bill, supposing that action not to have been improperly brought for the purpose of increasing costs. *Lambert v. Buckmaster*, 2 B. & C. 616. See *Re Sharpe*, 1 Dowl. 432. Where, in an action on an attorney's bill, which was defended on the ground of negligence, the client applied that a case with the opinion of counsel thereon, which had been procured for him by the plaintiff, and which was then in the plaintiff's hand, should be delivered up to him, upon his paying the costs of the same, or that a copy of it at his expense should be furnished to him: the court held that he was entitled to it; the case and opinion were his, whether the attorney were guilty of the negligence or not, and he had a right to it, upon paying for it. *Evans v. Delegal*, 4 Dowl. 374. This right of lien of the attorney, however, is merely co-extensive with the right of the client: if the client have no right, the attorney has no lien; if the client have a right to a certain extent, the attorney has a lien to that extent only. *Holles v. Claridge*, 4 Taunt. 807.

The client, upon paying his attorney's bill, has a right to have delivered up to him, not only the original deeds, papers,

&c., belonging to him, but also all drafts, copies, &c., which are in the hands of the attorney. *Ex p. Horsefall*, 7 B. & C. 528; and see *Ex p. Holdsworth*, 4 Bing. 386. And if in this case, where nothing is due to the attorney, the attorney refuse to deliver them up, upon being required to do so, the court or a judge will compel him. And they have exercised this summary jurisdiction, even where an attorney, as steward of a manor, had court rolls and other muniments in his hands, and refused to deliver them up to his employer. *Ex p. Corpus Christi College*, 6 Taunt. 105. But it is only at the instance of the client, or of those legally claiming under him, that the court will thus interfere. See *Re Thornton*, 2 Doucl. 156. *Ex p. Crisp*. *Id.* 455. Where a party gave a deed to an attorney, for the purpose of getting it executed by his client, the court refused to order him to deliver it up. *Ex p. Smart*, 1 Har. & W. 526. Where a man, having in his will made his house-keeper sole legatee, afterwards gave the will to his attorney for the purpose of destroying it, but died before the attorney had actually done so, and his son took out letters of administration: the court refused to order the attorney to deliver up the will to the legatee. *Ex p. Crisp*, 2 Doucl. 455. And where, pending a rule of this description, the Court of Chancery compelled the attorney to deposit the deeds, &c., in that court, the court of Queen's Bench discharged the rule. *Re Walmsley*, 4 Nev. & M. 543, 1 Har. & W. 88. So, where a party, after successfully resisting an action by an attorney for costs, on the ground of not having retained him, afterwards applied to have certain documents delivered up by the attorney, which had come to his hands in the course of the transactions in which the costs were incurred: Coleridge, J. held that, as the party had already treated the attorney as not being employed by him, he could not then be permitted to allege that he was, in order to compel him to deliver up these documents; and he accordingly refused the rule. *Ex p. Maxwell*, 4 Doucl. 87. Also, where an attorney holds deeds or papers for two parties, the court will not refer it to the master or prothonotary, to ascertain to which of the parties he should deliver them up. *Duncan v. Richmond*, 7 Taunt. 391. See *Ex p. Bretter*, 1 Har. & W. 212. And where an attorney, who had drawn his own marriage settlement, and with whom it had been deposited for safe custody, was allowed to retain it until after the only child of the marriage (and who was entitled to the property settled,) had come of age: Littledale, J. refused, after such a lapse of time, to order him to deliver the settlement up to the trustee. *Ex p. Moxon*, 1 Doucl. 6. And formerly, even in cases where the court would exercise this jurisdiction, with respect to an attorney, yet if the attorney became bankrupt, and the deeds of his client, amongst his other papers, came into the hands of his assignees, *Ex p.*

*Roy*, 1 Har. & W. 669, 4 Dowl. 573, or if the attorney died, and the deeds, &c. came into the hands of his executor, *Re Nicholls*, 12 Law J., 103, *qb.*, the court could not compel the assignees or executor, in this summary way, to deliver them up. But the practice in this respect, has been altered by the recent Act (*k*). The rule in these cases calls upon the attorney to show cause why he should not deliver to his client a bill of his costs, charges, &c., if any, and why upon taxation thereof, and payment of such sum as should be found to be due to him, he should not deliver up the deeds, &c., in question: you cannot make it part of the same rule, that in case he shall not deliver them up, an attachment shall issue against him; for the attachment can only issue for disobedience of the rule, if granted. *Roscoe v. Hardman*, 5 Dowl. 157, 2 Har. & W. 118.

An attorney has a lien upon a judgment obtained by him for his client, and upon any money levied under an execution upon it. And the same, where a sum of money is awarded to his client. *Ormerod v. Tate*, 1 East, 464. And where money was so levied under an execution for a plaintiff, it was holden that his attorney was entitled to have it paid over to him, notwithstanding the client had become bankrupt, and a docket was struck against him. *Griffin v. Eyles*, 1 H. Bl. 122. And if the opposite party, or his attorney or bail, after notice of the attorney's lien, *Welsh v. Hole*, 1 Doug. 238, by collusion with the client, pay him the debt, or compromise it with him, intending to defraud the attorney, the court, although they cannot interfere to prevent the client from discharging the other party, if in custody, *Marr v. Smith*, 4 B. & A. 466, or from entering satisfaction upon the roll, *Abbott v. Rice*, 3 Bing. 132, or consenting to a *stet processus*, or the like, *Quested v. Callis*, 10 Mees. & W. 18, without the consent of the attorney, will order the person so colluding with the client to repay to the attorney the sum recovered, or at least to the extent of his lien, *Read v. Dupper*, 6 T. R. 361. *Ormerod v. Tate*, 1 East, 464, or in very clear cases of collusion, but not otherwise, will allow the attorney to proceed in the action or against the bail, to recover it. See *Swain v. Senate*, 2 New R. 99. *Young v. Redhead*, 2 Dowl. 119. *Jordan v. Hunt*, 3 Dowl. 666, 1 Gale, 159. *Nelson v. Wilson*, 6 Bing. 568.

(*k*) It shall be lawful for the said respective courts and judges, in the same cases in which they are respectively authorized to refer a bill which has been so as aforesaid delivered, sent, or left, to make such order for the delivery by any attorney or solicitor, or the executor, administrator, or assignee of any attorney or solicitor, of such bill as aforesaid,

and for the delivery up of deeds, documents, or papers in his possession, custody, or power, or otherwise touching the same, in the same manner as has heretofore been done as regards such attorney or solicitor, by such courts or judges respectively, where any such business had been transacted in the court in which such order was made. *Id.* s. 37.



*Hedges v. Jordan*, 2 Har. & W. 92. *Graves v. Eades*, 5 Taunt. 429. *Wyllie et al. v. Phillips*, 3 Bing. N. C. 776. *Baber v. Harris*, 7 Dowl. 589. And where a plaintiff and defendant collusively settled an action, without the knowledge of the plaintiff's attorney, by the defendant's giving a bill for 24*l.*, of which 19*l.* was for the debt, and 5*l.* for the costs, although the latter actually amounted to 24*l.*: the bill having been deposited in the hands of a third party, the court of Exchequer, upon application, ordered it to be delivered up to the plaintiff's attorney, in satisfaction of his costs. *Gould v. Davis*, 1 Tyr. 380, 1 Dowl. 288. Still, however, as it is the client's action, not the attorney's, he has a right to settle it in what manner he pleases, provided he do not collude with the other party to defraud his own attorney. *Per Parke, B., in Jordan v. Hunt*, 3 Dowl. 667, 666. *Chapman v. Haw*, 1 Taunt. 341. *Bloomfield v. Blake*, 2 Dowl. 272. *McPherson v. Allsop*, 8 Law J., 262, *ex. And see Pyne v. Erle*, 8 T. R. 407. And where the defendant was arrested, and the plaintiff's attorney desired the officer not to let him go at large, without an express consent from him, as he had a lien for his costs; but the officer, by the plaintiff's authority, and without the consent of the attorney, discharged the defendant: the court held that the sheriff was not liable to the attorney for his costs. *Martin v. Francis*, 2 B. & A. 402. And in actions for unliquidated damages, as for an excessive distress, *Tovery v. Payne*, 1 B. & Ad. 660, 1 Dowl. 324, or the like, the attorney has no right, by notice or otherwise, to prevent the parties from compromising or otherwise settling the action before judgment, although the effect may be that he shall lose his costs.

In cases where judgments in cross actions are allowed to be set off, one against the other, there was formerly a difference in the practice of the courts, as to whether it should be done subject to the attorney's lien or not; in the Queen's Bench it was always subject to the attorney's lien, *Middleton v. Hill*, 1 M. & S. 240. *Randall v. Fuller*, 6 T. R. 456. *Stephens v. Weston*, 3 B. & C. 535. *Harrison v. Bainbridge*, 2 B. & C. 800. *Mitchell v. Oldfield*, 4 T. R. 123, unless where both sets of costs accrued in the same action, such as a set off of interlocutory costs against the costs of the action, or the like; *Howell v. Harding*, 8 East, 362, but see *Aspinall v. Stamp*, 3 B. & C. 108; and the same, seemingly, in the Exchequer; *Gifford v. Gifford*, *Forest*, 109. *Gabbit v. Chaytor*, 1 Anst. 279. *Smith v. Brocklesby*, 1 Anst. 61; but in the Common Pleas, in a set off of this description, the attorney's lien was not regarded. *Brown v. Sayce*, 4 Taunt. 320. *Lomas v. Mellor*, 5 Moore, 95. *Bridges v. Smyth*, 1 Dowl. 242. In order, however, to make the practice of the different courts, in this respect, uniform, it is now ordered by R. G. H. 2 W. 4, s. 93, that "no set off of damages or costs between parties, shall be allowed, to the pre-

judice of the attorney's lien for costs in the particular suit, against which the set off is sought: provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted." See *Doe v. Sinclair*, 5 Dowl. 26. The words "damages or costs" here mean damages or costs in adverse suits only. And therefore, where a verdict is found for some of several defendants, and a verdict against the others, the judgment for the defendants may be set off against the judgment for the plaintiff, without regard to the attorney's lien, not only in the court of Common Pleas, *George v. Elston et al.*, 1 Bing. N. C. 513, but in the court of Queen's Bench also. *Lees v. Kendall et al.* 5 Nev. & M. 340. Where, on the other hand, two causes between the same parties were referred to an arbitrator, and he awarded for the plaintiff in one, and for the defendant in the other, and directed that the damages and costs in the one case should be set off against the damages and costs in the other: the court, upon application, set aside so much of the award as related to the set off, as being contrary to the above rule. *Cowell v. Betteley*, 2 Dowl. 780. But where, in a set off for judgments in cross actions, it appeared that the attorney, who insisted that it should be subject to his lien, had conducted the action brought by him, in his own name, in a court of which he was not an attorney: the court held that he was not entitled to any lien for his costs, and that his client's judgment therefore should be set off against the judgment of the other party, without any regard to his claim. *Latham v. Hyde*, 1 Cromp. & M. 128, 1 Dowl. 594. The lien in this case, is as to the costs in that particular cause only, and not for the attorney's general balance; *Watson v. Maskell*, 1 Bing. N. C. 366; and is to be calculated upon a taxation as between attorney and client. *Watson v. Maskell*, 1 Bing. N. C. 727, 1 Hodg. 73.

*Lien of agents.*] An agent to a country attorney has no lien for his general balance, upon any money of the client which comes into his hands; *Moody v. Spencer*, 2 D. & R. 6; but he has a particular lien to the extent of his agency charges in that particular suit, even although the country attorney be indebted to his client in a sum exceeding the amount of his costs in the cause. *White v. Royal Exchange Assurance Co.* 1 Bing. 20. He has the ordinary lien of an attorney, however, for his general balance, upon the papers or money of his own client, the country attorney, which may at any time come into his hands. *Taunton v. Goforth*, 6 D. & R. 384. See *Bray v. Hine*, 6 Price, 203. *Gray et al. v. Kirby*, 2 Dowl. 601, and *ante*, p. 79.

*Taxation of costs.*] By stat. 6 & 7 Vict. c. 73, s. 37, after making provisions as to the delivery of a signed bill before

action brought, as mentioned *ante* p. 74, it is enacted that upon application of the party chargeable, to the courts therein mentioned, or a judge thereof, such court or judge may refer the said bill, and the attorney's or solicitor's demand thereupon, to be taxed by the proper officer of the court<sup>(l)</sup>. So, if a third party be liable to pay the bill, either to the attorney or to his client, he may apply to have it taxed<sup>(m)</sup>. Even after

(l) Upon the application of the party chargeable by such bill, within such month, it shall be lawful, in case the business contained in such bill or any part thereof shall have been transacted in the high court of Chancery, or in any other court of equity, or in any matter of bankruptcy or lunacy, or in case no part of such business shall have been transacted in any court of law or equity, for the lord high chancellor or the master of the rolls, and in case any part of such business shall have been transacted in any other court, for the courts of Queen's Bench, Common Pleas, Exchequer, court of Common Pleas at Lancaster, or court of Pleas at Durham, or any judge of either of them, and they are hereby respectively required, to refer such bill, and the demand of such attorney or solicitor, executor, administrator, or assignee thereupon, to be taxed and settled by the proper officer of the court in which such reference shall be made, without any money being brought into court; and the court or judge making such reference shall restrain such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, from commencing any action or suit touching such demand pending such reference; and in case no such application as aforesaid shall be made within such month as aforesaid, then it shall be lawful for such reference to be made as aforesaid, either upon the application of the attorney or solicitor, or the executor, administrator, or assignee of the attorney or solicitor, whose bill may have been so as aforesaid delivered, sent, or left, or upon the application of the party chargeable by such bill, with such directions and subject to such conditions as the court or judge making such re-

ference shall think proper; and such court or judge may restrain such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, from commencing or prosecuting any action or suit touching such demand pending such reference, upon such terms as shall be thought proper: Provided always, that no such reference as aforesaid shall be directed upon an application made by the party chargeable with such bill after a verdict shall have been obtained or a writ of inquiry executed in any action for the recovery of the demand of such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, or after the expiration of twelve months after such bill shall have been delivered, sent, or left as aforesaid, except under special circumstances, to be proved to the satisfaction of the court or judge to whom the application for such reference shall be made; and upon every such reference, if either the attorney or solicitor, or executor, administrator, or assignee of the attorney or solicitor, whose bill shall have been delivered, sent, or left, or the party chargeable with such bill, having due notice, shall refuse or neglect to attend such taxation, the officer to whom such reference shall be made may proceed to tax and settle such bill and demand *ex parte*. *Id.* s. 37.

(m) Where any person, not the party chargeable with any such bill within the meaning of the provisions herein-before contained, shall be liable to pay or shall have paid such bill either to the attorney or solicitor, his executor, administrator, or assignee, or to the party chargeable with such bill as aforesaid, it shall be lawful for such person, his executor, administrator, or assignee, to make

the bill has been paid, the court or a judge may order it to be taxed<sup>(n)</sup>.

But it should seem that after a bill has been settled and paid, the court will not, at any considerable distance of time, refer it for taxation, unless it can be impeached on the ground of

such application for a reference for the taxation and settlement of such bill as the party chargeable therewith might himself make, and the same reference and order shall be made thereupon, and the same course pursued in all respects, as if such application was made by the party so chargeable with such bill as aforesaid: Provided always, that in case such application is made when, under the provisions herein contained, a reference is not authorized to be made except under special circumstances, it shall be lawful for the court or judge to whom such application shall be made to take into consideration any additional special circumstances applicable to the person making such application, although such circumstances might not be applicable to the party so chargeable with the said bill as aforesaid if he was the party making the application. *Id.* s. 38.

And it shall be lawful, in any case in which a trustee, executor, or administrator has become chargeable with any such bill as aforesaid, for the lord high chancellor or the master of the rolls, if in his discretion he shall think fit, upon the application of a party interested in the property out of which such trustee, executor, or administrator may have paid or be entitled to pay such bill, to refer the same, and such attorney's or solicitor's, or executor's, administrator's, or assignee's demand thereupon, to be taxed and settled by the proper officer of the high court of Chancery, with such directions and subject to such conditions as such judge shall think fit, and to make such order as such judge shall think fit for the payment of what may be found due, and of the costs of such reference, to or by such attorney or solicitor, or the executor, administrator, or assignee

of such attorney or solicitor, by or to the party making such application, having regard to the provisions herein contained relative to applications for the like purpose by the party chargeable with such bill, so far as the same shall be applicable to such cases; and in exercising such discretion as aforesaid the said judge may take into consideration the extent and nature of the interest of the party making the application: Provided always, that where any money shall be so directed to be paid by such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, it shall be lawful for such judge, if he shall think fit, to order the same, or any part thereof, to be paid to such trustee, executor, or administrator so chargeable with such bill, instead of being paid to the party making such application; and when the party making such application shall pay any money to such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, in respect of such bill, he shall have the same right to be paid by such trustee, executor, or administrator so chargeable with such bill, as such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, had. *Id.* s. 39.

(n) The payment of any such bill as aforesaid shall in no case preclude the court or judge to whom application shall be made from referring such bill for taxation, if the special circumstances of the case shall in the opinion of such court or judge appear to require the same, upon such terms and conditions and subject to such directions as to such court or judge shall seem right, provided the application for such reference be made within twelve calendar months after payment. *Id.* s. 41.

some very gross overcharge, or of business being charged for, which was not in fact done, or for other fraud or imposition, or mistake, or on the ground of some other specific charge, distinctly pointed out. *Wilkinson v. Foster*, 7 Moore, 496. *Per Bayley, B.*, in *Grover v. Heath*, 2 Dowl. 285. *Ex p. Shipden*, 6 D. & R. 399. *Pistor v. Dunbar*, 1 Anst. 186. *Manning v. Brown*, 3 Dowl. 31. And where two persons, having a claim to some property, agreed with an attorney to sue for it at his own risk and expense, and he was to have one-third of any sum he should recover, instead of costs; and he accordingly sued, recovered a sum of money, paid it over to the parties, and received one-third according to the agreement: the parties eleven years afterwards, applied to have that sum refunded, or that the attorney should deliver a bill of his charges for the business done, and refund the balance after taxation: but Littleale, J. held that the application could not be entertained; however the court might deal with such a case, if the application had been made shortly after the transaction, yet after such a lapse of time, it was too late to impeach it. *Ex p. Yeatman*, 4 Dowl. 304, 1 H&R. & W. 510. So, after verdict, or writ of inquiry executed, in an action upon an attorney's bill, or after the expiration of twelve months from the delivery of the bill, it is not to be referred for taxation, except under special circumstances. 6 & 7 Vict. c. 73, s. 37, *ante*, p. 84, n. (1). In ordinary cases the application is made to a judge at chambers, upon summons; the court will not entertain it. *Basset v. Giblet*, 2 Dowl. 650. And the application must be made "in the matter of such attorney or solicitor." 6 & 7 Vict. c. 73, s. 43, *post* p. 89, n. (p). By R. G. H. 2 W. 4, s. 91, "an order to deliver or tax an attorney's bill, may be made at the return of one summons, the same having been served two days before it is returnable." The client should take care, when necessary, that the order contain the usual clause that the attorney shall refund what shall appear to have been overpaid to him; for the court will not afterwards supply that omission, or order the attorney, in a summary way, to refund the sum overpaid. *Peace v. Jones*, 8 Dowl. 314. So, if the attorney insist upon interest on any of the items of his bill, he must have it made part of the terms of the order; otherwise the master will not be warranted in allowing it in taxation. *Berrington v. Phillips*, 1 Mees. & W. 48, 404. See 3 & 4 W. 4, c. 42, s. 28.

We have hitherto been considering an application to tax before action brought. But after action brought on an attorney's bill, a judge at chambers may order it to be taxed; see *Watson v. Postan*, 2 Tyr. 406, 1 Dowl. 556. *Williams v. Griffith*, 6 Mees. & W. 32; and this may be done at the instance of one of two defendants, as well as of both. *Id.* But

in such a case, the usual practice is, to order final judgment to be signed at a particular time for the amount of the *allocatur*. See 6 & 7 Vict. c. 73, s. 43, *post*, p. 89. So, where an attorney seeks to set off the amount of a bill due to him for costs, the court may refer it for taxation. *Slater v. Brookes*, 9 Dowl. 349.

Having obtained the order, get an appointment on it from the master, and serve a copy of it upon the attorney. By R. G. H. 2 W. 4, s. 92, "one appointment only shall be deemed necessary for proceeding in the taxation of costs or of an attorney's bill." Attend the taxation accordingly; and if no person attend upon the part of the attorney, the master will tax the costs *ex parte*. 6 & 7 Vict. c. 73, s. 37, *ante*, p. 84, n. (1). See *Sadler v. Robins*, 1 Camp. 253. In taxing, the officer may tax off such of the costs as he may deem to have been unnecessarily incurred. *Per Patteson, J., in Heald v. Hall*, 2 Dowl. 163. But he cannot, under the usual order, tax off the charges for business which is alleged to have become useless to the client through the negligence of the attorney. *Jones v. Roberts*, 2 Dowl. 656. *Matchett v. Parkes*, 9 Mees. & W. 767; but see *Williams v. Nicholas*, 1 Dowl. N.C. 840. So, where the attorney charged a sum as paid by him for the client, for the amount of a proctor's bill, and the master refused to tax this latter bill, but allowed the whole of it, the court held that he had done rightly. *Franklin v. Featherstonhaugh* 3 Nev. & M. 779. But the master may refer any part of the bill, which is for business done in another court, to the officer of such other court for taxation; in which case the latter officer, and not the master, shall receive the fees for the taxation of that part of the bill so referred to him(o). Where the client entered into an agreement with his attorney, to pay him at a certain specified rate for business to be done, the court held that although such agreement was not binding, yet that charges made according to it, might be allowed on taxation, if the master, on inquiry into them, should think them proper; and where such charges had been allowed and paid, the court refused an application to review the taxation on this ground, made four months afterwards, it not being

(o) In all cases in which such bill shall have been referred to be taxed and settled, the officer to whom such reference is made shall be at liberty to request the proper officer of any other court having such an officer to assist him in taxing and settling any part of such bill, and such officer so requested shall thereupon proceed to tax and settle the same, and shall have the same powers, and may receive the same fees in

respect thereof, as upon a reference to him by the court of which he is such officer, and shall return the same, with his opinion thereon, to the officer who shall have so requested him to tax and settle the same; and the officer to whom such reference is made shall not be paid any fee for that portion of the bill which shall have been so taxed and settled by the officer of such other court at his request. *Id.* s. 42.

shown that the master had forbore to exercise his judgment on the charges, in consequence of the agreement. *Drax v. Scroope*, 2 B. & Ad. 581. See also *Re Masters*, 1 Har. & W. 348. 4 Dowl. 18. *Ex p. Yeatman*, 1 Har. & W. 510. On the other hand, where the attorney left blanks in his bill for the charges for certain business, which were discretionary, and the master in taxing made no allowance for them, and did not fill up the blanks with any sums: the court refused to order the master to review his taxation. *Eyre v. Shelley*, 10 Law J., 295, *ex*. The master also has no power to allow the attorney interest on the amount of his bill, although the attorney have given notice to his client, under stat. 3 & 4 W. 4, c. 42, s. 34, that he should claim interest; even where the reference for taxation is after action brought, interest cannot be allowed, unless a stipulation to that effect were made in the order. *Berrington v. Phillips*, 1 Mees. & W. 48. See further as to the taxation, *post*, in vol. 2, under the title "*Costs*."

If either party be dissatisfied with the taxation, he may move that the officer shall review it. If an attorney's bill for business done in the courts of Common Pleas and Queen's Bench, be referred to the master of the Common Pleas for taxation, and the master, as is usual, refer that part of it relating to the business in the Queen's Bench to the master of that court: the taxation of the master of the Queen's Bench is in that case deemed the taxation of the master of the Common Pleas, and any objection to it must be made, not to the court of Queen's Bench, but to Common Pleas. *Re Jones*, 1 Dowl. 424. And the same, as to the other courts. But if the court refuse to refer it back to the master, the taxation is conclusive as to the amount of the bill. See 6 & 7 Vict. c. 73, s. 43, *post*, p. 89, n. (p).

By stat. 6 & 7 Vict. c. 73, s. 37, the court or judge referring a bill for taxation, shall order that no action shall be commenced or prosecuted touching the attorney's demand upon the bill so referred, pending the reference and taxation. See *ante*, p. 84, n. (l). Where the client delayed obtaining an appointment to tax, and the attorney, treating that as a waiver, commenced an action on his bill, and caused his client to be arrested: the court held that he was not warranted in doing so, and the client was accordingly discharged, and the attorney ordered to pay the costs. *Sheriff v. Gresley*, 5 Nev. & M. 491, *overruling Stevenson v. Watson*, 1 B. & P. 365. But where the attorney commenced his action, after the taxation was completed, but pending an application as to the costs of taxation (more than a sixth having been taxed off), it was holden regular. *Hewitt v. Bellott*, 2 B. & A. 745.

After taxation, if the client refuse to pay what appears to be due to the attorney, the latter, in cases where the retainer

is not disputed, may obtain from the court or judge an order for judgment to be entered up for the amount with costs (p). Or instead of proceeding thus, the court upon application will grant a rule calling upon the client to show cause why he should not pay the amount; and upon that being made absolute, it will have the effect of a judgment under stat. 1 & 2 Vict. c. 110, s. 18, and give the attorney all the remedies which by that statute are given to judgment creditors, and among others, a writ of *fi. fa.* or *ca. sa.* for the amount. *Neale v. Postlethwaite*, 10 *Law J.*, 134, *qb.* 1 *Ad. & El. N. C.* 243. See *Richards v. Patterson*, 8 *Mees & W.* 313.

*Costs of taxation.*] By stat. 6 & 7 Vict. c. 73, s. 37, if the bill, when taxed, be less by a sixth part than the bill delivered, &c. the attorney, his executor, &c. shall pay the costs of taxation; but if not less by a sixth part, the client shall pay such costs; and the order of reference shall direct the officer to tax the costs of the reference, and to certify what shall be due to or from the attorney, in respect of the bill and of the costs of taxation (q). See *Doe d. Goodland et al. v. Frank-*

(p) All applications made under this act to refer any such bill as aforesaid to be taxed and settled, and for the delivery of such bill, and for the delivering up of deeds, documents, and papers, shall be made in the matter of such attorney or solicitor; and that upon the taxation and settlement of any such bill, the certificate of the officer by whom such bill shall be taxed shall (unless set aside or altered by order, decree, or rule of court,) be final and conclusive as to the amount thereof, and payment of the amount, certified to be due and directed to be paid, may be enforced according to the course of the court in which such reference shall be made; and in case such reference shall be made in any court of common law, it shall be lawful for such court or any judge thereof to order judgment to be entered up for such amount, with costs, unless the retainer shall be disputed, or to make such other order thereon as such court or judge shall deem proper. *Id.* s. 43.

(q) In case any such reference as aforesaid shall be made upon the application of the party chargeable with such bill, or upon the application of such attorney or solicitor, or the executor, administrator, or assignee of such attor-

ney or solicitor, and the party chargeable with such bill shall attend upon such taxation, the costs of such reference shall, except as herein-after provided for, be paid according to the event of such taxation; that is to say, if such bill when taxed be less by a sixth part than the bill delivered, sent, or left, then such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall pay such costs; and if such bill when taxed shall not be less by a sixth part than the bill delivered, sent, or left, then the party chargeable with such bill, making such application or so attending, shall pay such costs; and every order to be made for such reference as aforesaid shall direct the officer to whom such reference shall be made to tax such costs of such reference to be so paid as aforesaid, and to certify what, upon such reference, shall be found to be due to or from such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, in respect of such bill and demand, and of the costs of such reference, if payable: Provided also, that such officer shall in all cases be at liberty to certify specially any circumstances relating to such bill or taxation, and



land, 12 Law J. 249 qb. *Peters v. Shesham*, 1 Dowl. N. C. 943. But where the deduction of one-sixth is occasioned, not by the taxation of particular items, but by a whole branch of the demand being disallowed, *White v. Milner*, 2 H. Bl. 357, recognized in *K. B. 3 Nev. & M. 770*, but see 1 Gale, 160, 3 Dowl. 747, or by the master refusing to tax one of several bills of costs, on the ground of the client not being liable for it, *Mills v. Revett*, 3 Nev. & M. 767, these and the like cases, where the deduction is, not on the ground of overcharge, but merely because the attorney by mistake has charged to his client what he ought to have charged to some other person, the court will treat them as if the charge were not made, and grant the costs or not in the same manner as if the other parts of the account alone had been referred, and the other deductions on taxation alone had been made. But if even a whole class of items be struck out, which have been improperly charged to the client, if they be such as cannot be charged to any other person, they are to be reckoned among the items struck off the bill on taxation, in ascertaining whether a sixth have been struck off or not. *Morris v. Parkinson*, 2 Cr. M. & R. 178. *Newton v. Harland*, 9 Dowl. 641.

The usual contest in cases of this kind is, whether the attorney is warranted in including certain charges in his bill; and the difficulty usually arises, from charges for what are termed disbursements. The more charges of that kind which are rightly included in the bill, the less likelihood is there that the overcharges in matters of business, which may probably be taxed off by the master, will amount to the sixth of the whole. Where the attorney paid a proctor's bill for his client, it was holden that he might include it in his own bill, as a disbursement. *Franklin v. Featherstonhaugh*, 3 Nev. & M. 779. So, where the attorney charged as disbursements the payment by him of the debts and costs in two actions for his client, and gave credit for a sum of money received by him at a different time and for a different amount, which had not been specifically appropriated to such payment: Coleridge, J. held that the attorney had a right to introduce them as items in his bill. *Harrison v. Ward*, 1 Har. & W. 353; and see *Hindle v. Shackleton*, 1 Taunt. 536. But where the client gave his attorney a sum of money, to hand over to another person, as the debt and costs in a particular action, the court held that the attorney was not warranted in making that an item in his accounts; for all he had to do, was to convey the money from

the court or judge shall be at liberty to make thereupon any such order as such court or judge may think right respecting the payment of the costs of such taxation: Provided also, that where such reference as aforesaid shall be made when the same is not

authorized to be made except under special circumstances, as herein-before provided, then the said court or judge shall be at liberty, if it shall be thought fit, to give any special directions relative to the costs of such reference. *Id.* s. 37.

one party to the other. *Wollison v. Harrison*, 2 Dowl. 360; and see *Hays v. Trotter*, 5 B. & Ad. 1106, 3 Nev. & M. 174.

As these costs are added to or deducted from the amount of the bill, by the taxing officer, there is no occasion for any particular remedy for them, unless it be found that the attorney has been paid or overpaid, and that he is to pay the costs of taxation; in which case the client may recover it from him by rule, and execution, in the manner directed, *ante*, p. 88, 89. Where the client gave his acceptance to his attorney for the amount of his bill of costs, but afterwards had the bill taxed, and more than a sixth was deducted on taxation: the bill having been negotiated by the attorney, and dishonoured, the court upon application allowed him to pay the amount of the costs of taxation to the holder of the bill, in part payment of it, instead of paying them to the client. *Wollison v. Hodgson*, 2 Dowl. 351; and see 3 Dowl. 178. And where a bill of costs was referred for taxation, after an action brought upon it, the court held that the costs of taxation might be allowed as costs in the cause. *Thomas v. Mayor, &c. of Swansea*, 11 Mees. & W. 83. But no action will lie for them; nor can they be made the matter of a set off. See *Field v. Bezant*, 5 B. & Ad. 357.

#### 4. Punishment of attorneys for misconduct.

For very serious offences by an attorney, rendering him unfit any longer to be a member of the profession, the court will strike him off the roll, and will not restore him; and this, whether the offence have reference to his profession or not. If an attorney, in his character of attorney, knowingly do wrong, the court, in very gross cases, will also strike him off the roll, not in all cases permanently, but they may, and often do, restore him, after he has been off the roll for a period proportioned to his offence. Or in minor cases, if his wrongful act affect his client or a third party, the court often make him undo that which he has done, if that be practicable, and make him pay costs, &c.; and if he do not obey their rule in this respect, they will award an attachment against him. Or if his wrongful act have not affected another party, the court are generally satisfied in making him pay the costs of any application against him. But if his misconduct consist in wilfully not doing that which he ought to do, with respect to his client, the court will order him to do it, and in most cases will make him pay the costs; and if he do not obey their rule in this respect, they will award an attachment against him. These different degrees of misconduct, we shall now consider more at large, under the following heads; merely premising that if the party were an attorney of the court at the time of the act or negligence complained of, it is little

matter whether he remain on the rolls of the court, or not, at the time of the complaint. *Simes v. Gibbs*, 6 Dowl. 310. In all these cases, the affidavits to found the application may be intitled in the action in which the misconduct arose. *Id.*

*Indictable offences.*] The court will not call upon an attorney, to answer the matters of an affidavit, where the misconduct imputed to him amounts to an indictable offence; as his affidavit, in answer, might prejudice him, supposing an indictment to be afterwards preferred against him for the offence; besides, it is much better that such matters should be decided by a jury. *Re — Gent. 5 B. & Ad. 1088. Re Knight & Hall, 1 Bing. 142. Short v. Pratt, 1 Bing. 103. Robertson v. Mills, 1 Dowl. N. C. 772. Anon. 12 Law J. 331 qb.; but see 1 Wils. 221.* But the court of Exchequer have entertained an application to strike an attorney off the rolls of the court, and have struck him off the rolls, for conduct in the course of a cause in that court, which amounted to an indictable offence; although they held that they could not call upon him to answer the matters of an affidavit in such a case, nor would they interfere in this way, before conviction, where the offence had no reference to a proceeding in court. *Stephens v. Hill, 10 Mees. & W. 28.* But after he has been convicted, before the ordinary tribunal, the court may, if they think fit, order him to be struck off the roll, whether the offence have reference to a proceeding in court, or not. Also by stat. 12 G. 1, c. 29, if any person convicted of forgery, perjury, subornation of perjury, or common barratry, shall practise as an attorney, solicitor, or agent, in any suit or action in any court of law or equity in England, the judge may transport the offender for seven years, by such ways and under such penalties as felons. An attorney, who had been convicted of, and punished for felony, was in five years afterwards struck off the roll, although no misconduct in the intermediate time was imputed to him. *Ex p. Brown-sall, Coup. 829.* So, an attorney has been struck off the roll, after being convicted of a conspiracy. *Anon. 1 Chif. 557.* But in a recent case, where an application was made to strike an attorney off the roll, on the ground of his having been convicted of a conspiracy, Parke, J. discharged the rule, as there did not appear to be any thing aggravated in the circumstances of the case; he said there was no instance of an attorney being struck off the roll, merely on the ground of his having been convicted of a conspiracy, without reference to the circumstances of the case; as it might in some instances be an offence of great enormity, and in others of very slight culpability. *Anon. 1 Dowl. 174.* Nor will the court grant such an application, upon the ground of a verdict being obtained against an attorney in an action for a libel, however gross the libel may have been. *Anon, 2 Dowl. 110.*

*Culpable malfeasance, as an attorney.]* An attorney has been struck off the roll, for signing a fictitious name to a demurrer, as and for the name of a barrister. *Smith v. Matham*, 4 D. & R. 738. Where an attorney, although without any corrupt or unworthy motive, prepared a special case, in order to take the opinion of the court upon a will, and therein made suggestions which had no foundation in fact: the court held that he was guilty of a contempt, and fined him 30*l.* for his offence. *Re Elsam*, 3 B. & C. 697; *but see now stat. 3 & 4 W. 4, c. 42, s. 45.* Where an aged lady had obtained a judgment against the casual ejector, in ejectment for certain premises, and the attorney for the landlord afterwards called upon her, and, in the absence of her attorney, obtained her signature to a paper, whereby she agreed to abandon her judgment, and to allow the title to be fairly tried between her and the landlord: the court, upon application, ordered the attorney to give up the instrument to the old lady, and obliged him to pay the costs. *Re Oliver*, 4 Nev. & M. 471, 1 Har. & W. 79. Where a promissory note for 200*l.* was given to an attorney, by the father of an artied clerk, as a premium, the attorney undertaking not to negotiate it for five years; at the end of eighteen months, however, the attorney and the artied clerk separated, it being found that, from the articles not being stamped at the beginning of the clerkship, the time thus served would not be reckoned in the five years; the attorney then negotiated the note, and the father was arrested upon it: upon application, Taunton J., granted a rule requiring the attorney to take up the note, and ordered him to pay the costs of the application. *Exp. Gardner*, 2 Dowl. 520. Where an attorney executed a bond from himself to a client, upon a wrong stamp, the court, upon motion, compelled him to have a proper stamp put upon it. *Gwilliam v. Barnet*, 2 Smith, 155. Where an attorney acted on both sides, deluding the parties, and preventing them from having an interview; the court set aside the proceedings, and made the attorney pay the costs. *Berry v. Jenkins*, 3 Bing. 423. Where an attorney, employed by his client to raise money upon mortgage, disclosed a defect in his client's title to the intended lender, whereby the client sustained an injury: the court held that the client might maintain an action against him for the damage sustained from this breach of professional confidence, although the lender happened to be a client of his also. *Taylor v. Blacklan*, 3 Bing. N. C. 235. Where a defendant had been removed by habeas from Lincoln Castle to the King's Bench prison, and the plaintiff had been put to the expense of inquiring after six sets of bail, as to one of whom a false description had been given: the court ordered the defendant's attorney to pay the costs incurred by the plaintiff, although he swore that he had no personal knowledge of the

misdescription or insufficiency of the bail. *Blundell v. Blundell*, 5 B. & A. 533, 1 D. & R. 142. Where an application was made to strike an attorney off the roll, for having hired sham bail in error, and it was referred to the prothonotary, who reported that the attorney did not actually hire the bail, but that enough appeared to show that he was aware that the bail put in were hired bail: the court said that, as the offence, of which he appeared to be guilty, was of a lighter character than that originally charged, they thought the justice of the case would be answered by making him pay all the costs occasioned by the proceedings. *Dicas v. Warne*, 2 Dougl. 812. See *Clifford v. Parker*, 5 Dougl. 226. Where the attorney of a plaintiff, upon being applied to for the address of his client, and not knowing it himself except from two letters he had received from him, the one dated from Bridport, the other from Lynn, incautiously gave the address "Bridport;" and that being found to be wrong, he then gave the address "Lynn," which was also found erroneous: and because he had done thus, without first making proper inquiries as to the real address of the client, the court, upon application, made him pay all the costs occasioned by his conduct. See *Neal v. Holden*, 3 Dougl. 493. Where in putting in bail, a mistake was made in the christian name of one of the plaintiffs, and the plaintiff's attorney thereupon swore that there was no bail in that action, and moved that the defendant's attorney should pay the debt and costs in the action, for having caused the defendant to be superseded: the court discharged the rule, with costs to be paid by the attorney who had so sworn. *Clarke v. Gorman*, 3 Taunt. 492. But the court have refused to make an attorney answer the matters of an affidavit, where the charge against him was, that he had brought several *qui tam* actions against a party, evidently from vindictive motives. *Smith v. Gillett*, 3 Dougl. 364. *S. C. nom. Ex p. Warren*, 1 Har. & W. 113. So, the court refused a similar rule, where the only charge against the attorney was, that the client, having petitioned the insolvent court, handed over money to him by his advice, and upon his assurance that there was nothing wrong in doing so, and the client was afterwards remanded for having done so. *Smith v. Tower*, 2 Dougl. 673. So the court have refused to require a defendant's attorney to disclose by what authority he pleaded a sham plea. *Merrington v. A'Beckett*, 2 B. & C. 81.

*Gross negligence or ignorance, &c.*] Where the business done by an attorney, turns out to be wholly useless to the client, whether arising from gross ignorance or gross negligence on the part of the attorney, or from inadvertence or inexperience only, this will be a good defence to an action by the attorney for the amount of his costs. *Hill v. Featherstonhaugh*,

7 Bing. 569. And where an attorney, being instructed by an administratrix to bring an action against a tenant for rent, brought assumpsit for use and occupation, without previously inquiring whether the holding was or was not by deed; and upon its afterwards appearing to have been by deed, he was obliged to discontinue the action of assumpsit, and commence another action; and in taxing his bill as between him and his client, the master allowed him the costs in both actions; the court ordered the master to review his taxation, leaving the attorney to bring his action for the other costs, if he would. *Cliffe v. Prosser*, 2 Dowl. 21; and see *Montrieu v. Jefferys*, 1 Ry. & M. 317. And where a fine was left imperfect, through the negligence of an attorney, the court of Common Pleas ordered a new one to be levied at his expense. *Stone v. Stone*, 4 Taunt. 601.

And not only will the attorney be deprived of costs, for proceedings thus rendered useless by his negligence, &c., but in all cases where the client has sustained damage, through the gross negligence or gross ignorance of his attorney, he may maintain an action against the attorney for his damages; see *Jones v. Lewis*, 9 Dowl. 143; or if the negligence or ignorance can be plainly and clearly made out, but not otherwise (*Per Tindal, C. J.*, in *Meggs v. Binns*, *infra*), the court, upon summary application, will oblige the attorney to indemnify the client. Where a cause, which was meant to be defended, was called on and tried as an undefended cause, in consequence of the defendant's attorney neglecting to deliver his briefs, the court, upon application, granted a new trial, but compelled the defendant's attorney to pay the costs as between attorney and client, out of his own pocket. *De Rouffigny v. Peale*, 3 Taunt. 484, and see *White v. Sandell*, 3 Dowl. 798. But where it did not appear clearly from the affidavits that the attorney was guilty of negligence, the court refused to interfere thus in a summary way, although the client had sustained damage. *Meggs v. Binns*, 2 Bing. N. C. 625, 2 Hodg. 10. And where the injury to the client arises from a mere mistake of the attorney, upon a point of law on which a reasonable doubt may be entertained, the client cannot maintain any action for it, *Kemp v. Burt*, 1 Nev. & M. 262, nor will the court interfere in a summary way, upon motion, *Barker v. Butler*, 2 W. Bl. 780, nor will it prevent the attorney recovering the amount of his costs against his client. *Bulmer et al. v. Gilman et al.*, 11 Law J., 174, *cp. Elkington v. Holland*, 1 Dowl. N. C. 643. Where a client applied for a rule against his attorney to deliver up certain letters which he had written to him, to enable him to maintain an action against him for negligence, the court refused it, saying there was no precedent for such an application. *Lewis v. Briggs*, 2 Hodg. 4.

*Culpable nonfeasance.*] When an attorney has received money for his client, and refuses or neglects to pay it over, the client may either maintain an action against him for it, *see Sibley v. Leicester*, 2 Dowl. 234, or the court, upon application, will compel him to pay it over, (subject, of course, to his lien,) provided he be an attorney of the court. *Sharp v. Hawker*, 3 Bing. N. C. 66. But they will not require him to pay interest upon it. *Fenn v. Wild*, 1 Dowl. 498. *Ex p. Corpus Christi College*, 6 Taunt. 105; but *see Ex p. Burgin*, 1 Dowl. N. C. 292. And where an attorney, employed by both the vendor and purchaser of certain property, received the purchase money, and neglected to pay it over; and he afterwards became a bankrupt and obtained his certificate: the court held that as no fraud upon his part had been stated, they would not interfere; if fraud, indeed, had been stated, they might have punished him for it, by making him pay over the money. *Re Bonner*, 1 Nev. & M. 555. And where the attorney of a trustee, induced him and the cestui qui trust to allow him to sell out the trust money, which was in the funds, saying that he could obtain a higher interest by investing it upon mortgage; but instead of obtaining a mortgage, he applied it to his own purposes: after upwards of a year had passed without his investing the money, the court, upon application, ordered him to reinvest the money in the funds on or before a certain day, and to pay the costs; but a fiat in bankruptcy issued against him on the day next after that so appointed, upon which he obtained his certificate: upon an application to the court for an attachment, it was urged for the attorney, that as the claim was clearly barred by his certificate, the court would not interfere; but the court held that as the party was in contempt before the bankruptcy, and as fraud appeared clearly upon the face of the whole transaction, they would defeat the fraud by issuing the attachment. *Re Newbury*, 5 Nev. & M. 419, 1 Har. & W. 575. But the court will not interfere, if the client's right depend upon an alleged agreement between him and his attorney, and the right be contested by the attorney; *Hodson v. Terrail*, 2 Dowl. 264; nor will they interfere, except upon the application of the client; *Re Fenton*, 5 Nev. & M. 239, 1 Har. & W. 310; nor will they interfere, unless the attorney's engagement or liability arise from his employment as an attorney. *Re Chitty*, 2 Dowl. 421, 533. *Exp. Faith*, 9 Id. 973. *Exp. Cowie*, 3 Dowl. 600. *Cocks v. Harman*, 6 East, 404. *Re Ld. Cardross*, 7 Dowl. 861. Where, indeed, an attorney was employed by A. an administrator, to get in the debts, &c. due to the deceased, the court after A.'s death, ordered the attorney to account to his executors, although he had never been employed by A. or his executors to conduct any suit in law or in equity on his or their behalf; but the court held that the employment in this

case was so connected with the attorney's professional character, as to afford a fair presumption that his employment was in consequence of that character, and that they would therefore interfere in a summary way, to compel him faithfully to execute the trust reposed in him. *Re Aitkin*, 4 B. & A. 47. *Ex p. Knight*, 1 Bing. 91. *Ex p. Corpus Christi College*, 6 Taunt. 105. *Ex p. Hall*, 7 Moore, 437. But the courts at present seem rather disinclined to interfere to the extent of this case of *Re Aitkin*, and at all events, it may be deemed the very utmost extent to which they will go. And it is quite clear that where the transaction has no reference to the professional character of the attorney, the court will not interfere in this summary way; and therefore where an attorney advanced 10*l.* upon a deposit of bills of exchange to the amount of 25*l.*, and he afterwards received the amount of the bills, Patteson, J. refused a rule to make him pay over the balance. *Ex p. Schwalbanker*, 1 Dowl. 182. Where a rule called upon an attorney to furnish an account of monies received by him, and he furnished one, it was holden to be no ground for moving for an attachment against him, that he had omitted in the account sums which the party alleged that he had received. *Ex p. Lawrence*, 2 Dowl. 230.

*The motion, &c.*] A motion against an attorney, to show cause why he should not be struck off the roll, or for a rule calling upon him to answer the matters of an affidavit, must be made by counsel; the court will not allow any other person to address them upon the subject. *Ex p. Pitt*, 5 B. & Ad. 1077, 2 Dowl. 439, 3 Nev. & M. 566. This application is always made to the court, and never to a judge at chambers; so is the motion for an attachment. But an application that an attorney pay over money or the like, if it be made in a cause, is usually made to a judge at chambers; but if there be no cause in court, the application must be made to the court. *Ex p. Higgs*, 1 Dowl. 495. It must be made to that court of which the party is an attorney; see *Evans v. P—*, 2 Wils. 282; and the affidavit must state that he is an attorney of that court. *Re Becke*, 1 Har. & W. 417. *Ex p. Lord*, 1 Hodg. 195, but see *Ex p. King*, 3 Dowl. 41. *Ex p. Hore*, *Id.* 600. *Sharp v. Hawker*, 5 Dowl. 186, and see *Re Williams*, *Id.* 236.

The motion must be made within a reasonable time after the commission of the offence or other misconduct complained of: and therefore where the application was not made until three years and a half after the attorney was admitted, and the misconduct complained of occurred before his admission, the court refused the rule; *Re — Gent.* 2 B. & Ad. 766; and even where only three terms had elapsed, the application was holden to be too late. *Garry v. Wilks*, 2 Dowl. 649. Also,



we have seen, (*ante*, p. 45, n (k)), that any application to strike an attorney off the roll, for any defect in his articles of clerkship, or in the registry thereof, or in his service under such articles, or in his admission and enrolment, must be made within twelve months from the time of his admission and enrolment. 6 & 7 Vict. c. 73, s. 29. It may be necessary to mention that a rule nisi that an attorney shall answer the matters of an affidavit, cannot be moved for on the last day of term; *Re Turner*, 1 Har. & W. 217, 3 Dowl. 557. *Baily v. Jones*, 1 Chit. 744; and in the Exchequer, the court require it to be made so early in the term, that the attorney may have time to show cause against it during the same term. *Ex p. —*, 2 Dowl. 227.

The form of the motion may readily be collected, from what has been already stated, *ante*, p. 91, &c. where we have considered in what cases, and how, the courts will punish an attorney for misconduct. Where the misconduct arises from not doing something which the attorney was required to do by a rule of court, or a judge's order made a rule of court, the application must be for an attachment, and not that the attorney shall answer the matters of the affidavit. *Ex p. Townley*, 3 Dowl. 39. *Ex p. Grant*, *Id.* 320. And you cannot move for the rule nisi in the alternative, that he do a certain act, or that an attachment shall issue against him; but you must first move that he do the act, and make that rule absolute; and if the attorney afterwards disobey the rule, move for an attachment. *Roscoe v. Hardman*, 5 Dowl. 157, 2 Har. & W. 118. But where a rule was made absolute, that an attorney should do a certain act, and that if he did not do so, an attachment should issue against him: it was holden that, upon the usual affidavit of his having disobeyed the rule, the attachment might issue in the first instance. *Ex p. Grant*, 3 Dowl. 320.

The affidavit in support of the application may be intitled in the cause in which the misconduct arose, if in fact it arose in any cause; *Simes v. Gibbs*, 6 Dowl. 310; if it did not, it may or may not be intitled in the matter of the attorney. If it do not state the misconduct directly and positively, it must state, not merely facts from which it may be inferred, but also the information and belief of the party that the attorney is guilty of the misconduct the deponent imputes to him. *Re King*, 3 Nev. & M. 716. As to the affidavit in answer, where the party swore to an incredible story, the court made the rule absolute for an attachment, although he positively denied the malpractices imputed to him. *Re Crossley*, 6 T. R. 701.

If the rule be made absolute against the attorney, he will be obliged to pay the costs as a matter of course. If on the other hand, there appear to be no ground for the application, the rule will be discharged with costs. But if there appear to be reasonable and probable cause for applying to the court against

the attorney, although it eventually turn out that there is no actual ground for imputing misconduct to him, the court will not give him the costs of the application. *Doe d. Thwaites v. Roe*, 3 D. & R. 226.

If the matter be referred to the master, he is not confined to the affidavits made use of in court, but may receive any other affidavits the parties may choose to make, on either side. *Dicas v. Warne*, 2 Dowl. 812.

If the attorney be struck off the rolls of one court, the other courts, upon application, and upon merely reading the rule in that case, will also make the same order, without further investigating the circumstances of the case; *Ex p. Yates*, 1 Dowl. 724, C. P. R. M. 1654, but see *Re Smith*, 1 Brod. & B. 522. *Ex p. Hague*, 3 Brod. & B. 257. *Dax*, 29; and if afterwards re-admitted by the court which first struck him off, the other courts, upon application, and upon reading the rule for his re-admission, will also order him to be re-admitted. *Ex p. Yates*, *supra*. See *Ex p. Parry*, 5 Dowl. 81.

*Striking an attorney off the roll, at his own request.*] If an attorney wish to be struck off the roll, for the purpose of being called to the bar, or the like, the court upon application will make an order accordingly, upon his stating by affidavit that no proceedings are pending against him as attorney, and that he expects none. See *Ex p. Gray*, 9 Dowl. 336.

#### SECTION III.

##### *Agents to attornies.*

*Their duties, &c.*] Country attornies usually have agents to transact such parts of their business as must be done in London. Both, of course, must be attornies, regularly admitted, and duly certificated. The agent for the plaintiff's attorney sues out the writ, and his indorsement upon it, makes him known to the opposite party; the agent for the defendant's attorney enters a common appearance, and thereby becomes known to the plaintiff's agent; after which, all the proceedings in the cause, to issue and notice of trial inclusive, are transacted between the agents, precisely as if they were the only attornies in the cause. The plaintiff's agent makes up the nisi prius record, sues out jury process, and transmits them to the country attorney, if the cause is to be tried in the country. Notice of trial or inquiry, and of continuance of inquiry, shall be given in town; but countermand of notice of trial or inquiry may be given in either town or country, unless otherwise ordered by the court or a judge. *R. G. H. 2 W. 4, s. 57*, and see *Cheslyn v. Pearce*, 1 Mees. & W. 56. And after the cause is tried, the agent in town obtains the postea from the associate,

procures the costs to be taxed, sues out execution, and transmits it to the country attorney, or to the under-sheriff of the county where it is to be executed, or delivers it to the under-sheriff's agent in London.

If the trial be in London or Westminster, the country attorney seldom attends it, unless it be a cause of considerable importance, or that his presence be necessary as a witness, or the like: and it is accordingly holden to be a matter of discretion with the master, whether he will allow for such attendance in costs or not. *Parsloe v. Foy*, 2 Dowl. 181. So, if the trial be in the country, the London agent seldom attends it, unless it be a cause of great magnitude; in which case, the attendance of such agent, intimately acquainted, as he must be, with all the proceedings in the cause, may be of serious importance to the client.

But although the London agents have thus the management of the cause until trial, and afterwards until execution, there is no privity whatever between them and the clients. If an agent be guilty of negligence, and the attorney's client thereby sustain an injury, the client cannot sue him, nor will the court entertain any application against him, upon the part of the client, for there is no privity between them; the client's remedy in such a case is against his own attorney. *Ex p. Jones*, 2 Dowl. 161, and see *Gray v. Kirby*, *Id.* 601. So, the agent cannot sue the client, for the amount of his costs, in any particular cause. Nor has he a general lien on the money or papers of the client in his hands, for any balance due to him by the country attorney; he can claim merely to the extent of his agency costs in the client's suit. *White v. Royal Exchange Assurance*, 1 Bing. 21, and see *Moody v. Spencer*, 2 D. & R. 6. *Bray v. Hine*, 6 Price, 203. But he has the ordinary lien of an attorney, for his general balance, upon the papers or money of his own client, the country attorney, which may at any time come into his hands. *Taunton v. Goforth*, 6 D. & R. 384, and see *Gray v. Kirby*, 2 Dowl. 601.

Their bills may now be referred to the master for taxation, in precisely the same manner as the bills of any other attornies. See *ante*, p. 75.

Where, in a country cause, notice of trial was given, but no further proceedings were taken for seven years, when the defendant obtained a rule nisi for judgment as in case of a non-suit, and served it upon the agent in town; the agent knew nothing of the plaintiff, he had been agent to his attorney, but had ceased to be so; and the country attorney had left his place of residence, and the agent did not know where he was to be found: this being stated to the court, by affidavit, on the part of the agent, the court enlarged the rule, so as to give time to the defendant to serve it upon some other person. *Curtis v. Tabram*, 1 Har. & W. 523.

## BOOK II.

### PROCEEDINGS IN ACTIONS GENERALLY.

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#### CHAPTER I.

##### *Limitation of Action.*

*What.*] The time limited for bringing an action, after the cause of action has accrued, is, in assumpsit, six years; 21 *Jac.* 1, c. 16, s. 3; in debt on contract without specialty, six years; *Id.*; in debt on specialty, and debt or *scire facias* on recognizance, twenty years; 3 & 4 *W.* 4, c. 42, s. 3; in debt on award, where the submission is not by specialty, debt for copyhold fines, debt for escape, and debt for money levied under a *fi. fa.* six years; *Id.*; in covenant, twenty years; *Id.*; in actions for penalties, &c. by parties grieved, two years; *Id.*; in actions upon penal statutes for penalties or forfeitures, one year, if the action be brought by a subject, two years, if brought in the name of the Queen only; 31 *El.* c. 4, s. 5; in trespass *quare clausum fregit*, and trespass for taking goods, six years; 21 *Jac.* 1, c. 16, s. 3; in trespass for assault, battery, or false imprisonment, four years; *Id.*; in actions on the case, six years, except in an action for verbal slander, (where the words are actionable without special damage, *Arch. Pl. & Ev.* 31,) four years; *Id.*; in detinue and trover, six years; *Id.*; in replevin, six years, *Id.*; in ejectment, twenty years; 3 & 4 *W.* 4, c. 27, s. 2, &c.; in actions for arrears of rent, or of interest on money chargeable on or payable out of land, six years; *Id.* s. 42; in suits by the Crown, sixty years. 9 *G.* 3, c. 16, s. 1, 10. See upon this subject, *Arch. Pl. & Ev.* 21—34.

The time thus limited begins to run, from the accruing of the cause of action: in actions on contracts, from the time of the breach, and not from the time the plaintiff first sustained special damage from it, *Battley v. Faulkner*, 3 *B. & A.* 288, or first had a knowledge of it; *Granger v. George*, 5 *B. & C.* 149; in an action against an attorney for negligence, &c. from the time of the negligence, and not merely from the time the client knows of, or sustains damage from it; *Howell*

*v. Young*, 5 B. & C. 259. *Brown v. Howard*, 2 Brod. & B. 73. *Short v. M'Carthy*, 3 B. & A. 626. *Whitehead v. Howard*, 2 Brod. & B. 372; in an action for money lent, &c. payable at a particular time, from the time it is payable; *Wittershiem v. Countess of Carlisle*, 1 H. El. 631; in an action on a promissory note payable at a particular time, from the time it is payable, *Id.*; and where a note is payable by instalments, some of the instalments may be barred by the statute, others not; see *Gray v. Pindar*, 2 B. & P. 427; in an action on a bill of exchange payable after sight, from the time of presentment; *Holmes v. Kerrison*, 2 Taunt. 323; but in the case of a note payable on demand, from the date of the note, and not from the time of the demand; *Christie v. Fonswick*, 1 Selw. N. P. 136, 361; in trover, from the time of the conversion, and not from the time the plaintiff became acquainted with it; *Granger v. George*, 5 B. & C. 149; in actions for penalties for usury, from the time the usurious interest is received. See *Lloyd v. Williams*, 3 Wils. 250. *Wade v. Wilson*, 1 East, 195. *Scurry v. Freeman*, 2 B. & P. 381. As to the effect of the plaintiff's being an infant, feme covert, non compos, imprisoned, or beyond seas, in preventing the time limited from running, see *Arch. Pl. & Ev.* 32; and as to the effect of there being mutual accounts subsisting between the parties, see *Id.* 27; and as to the effect of a new promise or acknowledgment, see *Id.* 27—29.

*Process sued out, &c. to save the statute.*] In order to prevent the statute from being a bar to the action, the action must be commenced, that is to say, a writ must be sued out, before the time limited for that purpose has expired. Where it was sued out before the expiration of the time, but on account of some alteration in the writ it was obliged to be resealed, and the resealing was after the time expired: the court held it to be sufficient, as the resealing did not amount to a reissuing of the writ. *Braithwaite & Ld. Montford*, 2 Cr. & M. 408. In all cases where such writ was not sued out before the 2nd November, 1832, the manner of doing it, and of continuing it down to the time when the defendant shall be actually served or arrested, is now regulated by the uniformity of process act, 2 W. 4, c. 39; by the 10th section of which it is provided, "that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited,"—

1: "Unless the defendant shall be arrested thereon or served therewith,"

2: Or unless "proceedings to or toward outlawry shall be had thereupon;"

3: Or "unless such writ, and every writ (if any) in continuation of a preceding writ, shall be returned non est in-

ventus, and entered of record within one calendar month next after the expiration thereof, including the day of such expiration:" "the return to be made, in bailable process, by the sheriff or other officer to whom the writ shall be directed, or his successor in office; and in process not bailable, by the plaintiff or his attorney suing out the same, as the case may be."

And, in this latter case, "unless every writ, issued in continuation of a preceding writ, shall be issued within one calendar month after the expiration of the preceding writ, and shall contain a memorandum indorsed thereon or subscribed thereto, specifying the day of the date of the first writ."

The writ in this case of course is a writ of summons.

*Sue out the writ as in ordinary cases; and at the end of four months indorse a return of non est inventus upon it, and having got a roll, enter it upon it with an award of an alias; see the form of the entry, in the Appendix; take the roll to the Master's office, and docket the entry; and then file the writ and return. It is not necessary to make any attempt to serve it. Williams v. Roberts, 1 Cr. M. & R. 676. Then sue out an alias, which need not be tested on the day the former writ was returned, see Nicholson v. Leman, 2 Dowl. 296, but must of course bear teste on the day on which it is sued out; and at the end of four months, indorse a return of non est inventus, upon it, have the return entered on the roll, with an award of a pluries, and file the writ and return; and so on, until the defendant is actually served, and you proceed in the action.*

Where a plaintiff applied for leave to serve the agent of the defendant with a writ of summons, in order to save the statute of limitations, as the defendant himself, being abroad and out of the jurisdiction of the court, could not be personally served: Patteson, J. refused it, saying there was no precedent for such a motion, and that the only regular mode of proceeding in such a case was under this statute. *Frith v. Ld. Donegal*, 2 Dowl. 527. And on the other hand, there is no mode of taking advantage of the statute of limitations, but by pleading it; and therefore where a defendant moved to set aside a *capias*, and that he should be discharged out of custody, on the ground of the debt being barred by the statute of limitations, as appeared from the plaintiff's own particulars, Williams, J., refused the motion. *Potter v. Macdonel*, 3 Dowl. 583.

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If process to save the statute of limitations had already been sued out and returned, entered and filed, before the passing of the above statute, 2 W. 4, c. 39, (2 Nov. 1832), the case is not within the statute; but the plaintiff must proceed as if that statute had never passed, that is to say, as soon as the

defendant can be served or arrested, the plaintiff must sue out a writ of the same nature as the writ which is filed, namely a bill of Middlesex, *latitat*, *capias* by continuance, *quo minus*, &c. and the officer who now signs the writ of summons will sign it, *Finnie v. Montague*, 5 B. & Ad. 877, and the sealer of the writs will seal it; it may then be executed. If executed, continuances should then be entered on the roll, by *vicecomes non misit breve*, from the award of the *alias*, down to the writ last sued out, including the return to it. See the form of the entry in the Appendix. A bill of Middlesex has been holden to be a good continuance of a *latitat*; *French v. Maswood*, 2 Dougl. 565; and a bailable *latitat*, a good continuance of a non-bailable bill of Middlesex; *Plummer v. Woodburne*, 4 B. & C. 625; and a *distringas*, a good continuance of a bill and summons against a member of Parliament. *Taylor v. Duncombe*, 2 Dougl. 401. But an attachment of privilege is no continuance of a bill of Middlesex. *Smith v. Bower*, 3 T. R. 662. And where the last writ varied from the first in the name of the defendant, it was holden to be no continuance of the first writ. *Corbett v. Bates*, 3 T. R. 660. But a mere informality in the first writ, *Leadbeter v. Markland*, 2 W. Bl. 1131. *Beardmore v. Rattenbury*, 5 B. & A. 452, or its being irregularly sued out, *Darwin v. Lincoln*, 5 B. & A. 444, will not prevent its being a bar to the statute. As to the return of the first writ, see *Stanway v. Perry*, 2 B. & P. 157. *Taylor v. Hipkins*, 5 B. & A. 489.

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## CHAPTER II.

*Process and other proceedings in the action, to declaration.*

### SECTION I.

#### *Writ of Summons.*

*In what cases.*] By stat. 2 W. 4, c. 39, process in all personal actions commenced in any of the courts of law at Westminster, where it is not intended to proceed against a member of parliament according to the provisions contained in stat. 6 Geo. 4, c. 16, "shall, whether the action be brought by or against any person entitled to the privilege of peerage, or of parliament, or of the court in which such action shall be brought, or of any other court, or to any other privilege, or by or against any other person, be according to the form contained in the schedule to this act annexed, marked No. 1; and which pro-

cess may issue from either of the said courts, and shall be called a writ of summons." See the form in the Appendix. And great care must be taken that the form used be correct, and be filled up correctly. See *Smith v. Crump*, 1 Dowl. 519. Where the copy served omitted the memorandum, required in the form given by the statute to be subscribed to the writ, that it must be served within four calendar months: the court set it aside, with costs. *Patteson v. Busby*, 5 Mees. & W. 95. *Law. J.* 16 *ex.* So, a writ commencing "William the fourth," instead of "Victoria," was holden irregular, and was set aside with costs. *Drury & Davenport*, 3 Mees. & W. 45.

It may be necessary to mention, that there is no objection to suing out several writs, and have them running at the same time, and bearing teste on the same day. *Angus v. Coppard et al.* 3 Mees. & W. 57. But it will be in the discretion of the masters whether more than one writ shall be allowed on taxation of costs, except in the case of several defendants living in different counties.

*How directed.*] The writ is directed to the defendant himself, and not to the sheriff, as the *capias* and other writs usually are. In the form given in the statute, the direction is: "To C. D., of, &c. in the county of —;" and by stat. 2 W. 4, c. 39, s. 2, "in every such writ and copy thereof, the place and county of the residence or supposed residence of the party defendant, or wherein the defendant shall be or shall be supposed to be, shall be mentioned." Where the defendant was described as of "Tufton Street, in the county of Middlesex," without stating any parish, Littledale, J. held it to be sufficient. *Cooper v. Wheale*, 1 Har. & W. 525, 4 Dowl. 281. Where the defendant was described as residing in B. street, in the county of York, and he actually resided in C. street in Hull: but as B. street was a continuation of C. street, and the defendant lived within twenty yards of the boundary line between Yorkshire and Hull, Littledale, J. held it to be sufficient; under the circumstances, his residence might be "supposed" to be in Yorkshire, within the meaning of the act. *Jelks v. Fry*, 3 Dowl. 37. Where he was described as of Newcastle upon Tyne, in the county of Northumberland, and it appeared that although the town was a county of itself, yet that some part which had been added to it by the Boundary act, was within Northumberland, the court held it to be sufficient. *Rippon v. Dawson*, 5 Bing. N. C. 206, 8 Law. 102 *cp.* Where the writ described the defendant as of Symond's Inn, Chancery Lane, in the city of London, and upon a motion to set aside the writ, on an affidavit, that the deponent had been informed and verily believed that Symond's Inn was in Middlesex: the court held that swearing merely to information and belief, was not sufficient in such a case to satisfy them that the description was wrong;



and they refused the rule. *Lewis v. Newton*, 3 Cr. M. & R. 732. Also, the words in the statute "where the defendant shall be or shall be supposed to be," are holden to be satisfied, by directing the writ to him at his last place of residence, or, in an action on a bill or note, at the place mentioned as his residence on the face of it. *Norman v. Winter*, 5 Bing. N. C. 279. It is not necessary, however, to give the defendant any addition of degree or mystery in the writ or copy; the statute does not require it. *Morris v. Smith*, 2 Cr. M. & R. 120.

And by R. G. M. 3 W. 4, s. 1, the writ "shall contain the names of all the defendants, if more than one, in the action, and shall not contain the name or names of any defendant or defendants in more actions than one." Formerly when writs were stamped, you could include only four defendants in one writ; and where there were more than four defendants in an action, you were obliged to sue out a writ for every four. You must now, however, include all the defendants in one action in the same writ; for if your declaration be against more defendants than are named in one writ, the court upon application will set it aside for irregularity. On the other hand, if you declare against one defendant only, where there are two in the writ, it will not be irregular; *Coldwell v. Blake*, 2 Cr. M. & R. 249. *Stables v. Ashley*, 1 B. & P. 49; but you cannot afterwards declare against the other, in a separate action. *Pepper v. Whalley*, 1 Bing. N. C. 71, 2 Dowl. 821. See post, tit. "Declaration."

The names also of the plaintiff and the defendant should be stated correctly; but a mistake in this respect, in non-bailable actions, is not very material, as no objection can now be made for misnomer until after the plaintiff has declared, and then only by application to a judge at chambers, to compel the plaintiff to amend and pay costs. 3 & 4 W. 4, c. 42, s. 11. And a description of the defendant by the initial letter of his christian name, is within this statute. *Rust v. Kennedy*, 4 Mees. & W. 586, 8 Law. J. 85, ex. But if the action be upon a bill of exchange, promissory note, or other written instrument, in which the defendant is described by the initial letter, or a contraction of his Christian or first name or names, it shall be sufficient in the writ to designate the defendant by the same initial letter or contraction of his Christian or first name or names, without stating such Christian or first name or names in full. 3 & 4 W. 4, c. 42, s. 42.

*Teste and duration of the writ.*] The writ "shall bear date on the day on which it is issued, and shall be tested in the name of the lord chief justice or lord chief baron of the court from which the same shall issue, or in case of a vacancy of such office, then in the name of a senior puisne judge of the said court." 2 W. 4, c. 39, s. 12. And it "shall not be in force

more than four calendar months from the day of the date thereof, including the day of such date." *Id.* s. 10. If the writ bear date on a Sunday, it is wholly void. *Hanson v. Shackleton*, 1 *Har. & W.* 342, 4 *Dowl.* 48: And the writ is now deemed the commencement of the action; therefore where an assignment of a bail bond was taken on the 10th, and a writ of summons sued out on the same day, but the bail bond was not in fact forfeited until the 11th, the court upon application set aside the proceedings as irregular, although the writ was not served upon the defendants until the 11th. *Alston v. Underhill*, 2 *Dowl.* 26.

*Cause of action, &c.*] The form of the writ given in the statute, describes the nature of the action thus "in an action on promises, or as the case may be." As to the action of *assumpsit*, it must be described strictly as in this form; and therefore where the writ described it as "an action of trespass on the case upon promises," the court set it aside for irregularity. *King v. Sheffington*, 1 *Cromp. & M.* 363. So, "action on the case promises," has been holden bad. *Youlton v. Hall*, 1 *Mees. & W.* 582, 8 *Law. J.* 147, *ex.* But where it was an "action promises," omitting "on," Littledale, J. held it sufficient. *Cooper v. Wheale*, 1 *Har. & W.* 525, 4 *Dowl.* 281. So describing it as an "action of libel," *Pell v. Jackson*, 2 *Dowl.* 445, or "an action of slander," *Davies v. Parker*, 2 *Dowl.* 537, or "an action of trover," see *Collaghan v. Harris*, 2 *Wils.* 392, has been deemed sufficient.

Care must be taken to state correctly the cause of action for which you intend afterwards to declare; for if you declare in any other form of action than that described in your process, the court will set aside the declaration for irregularity, upon the ground that there is no process to warrant it. But the court will not interfere in such a case, until after declaration, although there be a variance between the writ and the particulars of demand. *Davies v. Jones*, 1 *Cr. M. & R.* 582. But where the writ was in trespass on the case, and the declaration in trover, it was holden regular. *Bate v. Bolton*, 4 *Dowl.* 160. And where the writ was, to answer the plaintiff in "a special action," but the declaration was on promises, and the application was to set aside the declaration: the court discharged the rule, saying that the irregularity was not in the declaration but in the writ. *Moore v. Archer*, 4 *Dowl.* 214.

*How indorsed.*] There must be two indorsements on the writ: the first as to the name and address of the attorney or plaintiff who sues out the writ, and which is required by stat. 2 *W.* 4, c. 39, s. 12; the second, as to the claim for debt and costs, and which is required by R. G. H. 2 *W.* 4, r. 2, "upon the copy of any process served for the payment of any debt."

But the omission of these will not render the writ or copy void, but it may be set aside as irregular. *R. G. M.* 3 *W.* 4, s. 10. The forms of these indorsements are as follow :

*This writ was issued by E. F. of — attorney for the said A. B.* Or, *This writ was issued in person by A. B. who resides at* [mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such.] 2 *W.* 4, c. 39, *Sch. No.* 1. If there be no indorsement of the name, &c., of the attorney, the court will set aside the process for irregularity. See *Sheppard v. Shum*, 2 *Tyr.* 742. Where the indorsement of the name, &c., of the attorney was "*Poole & Gamlen, Gray's Inn, London,*" it was holden sufficient, although Gray's Inn, is in fact in Middlesex; *Engleheart v. Eyre*, 2 *Dowl.* 145. *S. P. Jelks v. Fry*, 3 *Dowl.* 37; and this has since been holden good with respect to an indorsement by a plaintiff in person. *King v. Monkhouse*, 2 *Cr. & M.* 314. So "*James Robertson, 10, Gray's Inn Square, Holborn,*" has been deemed sufficient. *Youtton v. Hall*, 7 *Dowl.* 175, 8 *Law, J.* 147, *ex.* And where the writ is sued out by two or more attorneys in partnership, it is in all cases sufficient to state the name of the firm, without giving the Christian and surnames of each of the partners. *Pickman v. Collis*, 3 *Dowl.* 429. *Hartley v. Rodenkurst*, 4 *Dowl.* 748. But "*No. 32, Great James Street, Bedford Row,*" without more, was holden insufficient. *Lloyd v. Jones*, 5 *Dowl.* 161. So "*Southampton Buildings,*" without more, has been deemed bad. *Rust v. Chine*, 3 *Dowl.* 565. The indorsement must also state for whom the person indorsing is attorney. And, therefore, where the indorsement left a blank for the name, the court set aside the writ for irregularity. *Ward v. Lloyd, et al.* 9 *Dowl.* 213, 10 *Law, J.* 182, *ex.* Where the attorney was described as attorney "*for the said plaintiff,*" instead of "*for the said A. B.*" as in the form of the indorsement given by the statute, it was holden sufficient. *Hennah v. Whyman*, 2 *Cr. M. & R.* 239. Where the plaintiff, who sued in person, was described as "*of —*" instead of "*who resides at —*," as in the above form, it was holden sufficient. *Yardley v. Jones*, 4 *Dowl.* 45, 1 *Har. & W.* 332. See *Lewis v. Davison*, 3 *Dowl.* 272. And where attorneys, who were plaintiffs in person, described themselves as "*R. & C. Arden, who reside at No. 1, Clifford's Inn Passage, Fleet Street, in the city of London,*" without mention of the parish, it was holden sufficient. *Arden v. Jones*, 4 *Dowl.* 120, *S. C. nom Arden v. Garry*, 1 *Hodg.* 197. So "*W. H. King, who resides at 7, Gray's Inn Square, London,*" was holden sufficient. *King v. Monkhouse*, 2 *Cr. & M.* 314. Where the indorsement was of the name of one, who was an attorney, but not an attorney of the court, it was holden not to be an irregularity, but the court stayed the proceedings, until an attorney of the court should be appointed. *Constable v. Johnstone*,

1 Cr. & M. 88. If the attorney, whose name is indorsed, deny that it was issued by his authority, all proceedings upon it shall be stayed until further notice. *R. G. M. 3 W. 4, s. 14.*

By *R. G. M. 3 W. 4, s. 9*, "when the attorney actually suing out the writ, shall sue out the same as agent for an attorney in the country, the name and place of abode of such attorney in the country, shall also be indorsed upon the said writ." The indorsement in this case may be thus: "*this writ was issued by John Smith, of No. 3, Elm Court, in the Temple, London, agent for James Walker of Beverley, in the East Riding of the county of York, attorney for the said John Nokes.*" Where a writ is indorsed with the name of an attorney as agent for a plaintiff who sues in person, it has not as yet been decided whether the plaintiff's address shall also be given in the indorsement with the same particularity as is above required: the point was in one case before the court, but the agent's own description being insufficient, the point was not decided. *Lloyd v. Jones*, 5 Dowl. 161. It is no objection, however, that the agent, and not the attorney, appears afterwards in the declaration as the attorney. *Armstrong v. King*, 8 Dowl. 297.

As to the indorsement of the debt: it is required by *R. G. H. 2 W. 4, r. 2*, that upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such process, copy and service, and attendance to receive debt and costs; and that upon payment thereof within four days to the plaintiff or his attorney, further proceedings will be stayed: but the defendant shall be at liberty, notwithstanding such payment, to have the costs taxed, and if more than one sixth shall be disallowed, the plaintiff's attorney shall pay the costs of taxation. The indorsement must be in this form:

"*The plaintiff claims [£30 10s.] for debt, and [11. 17s. 6d.] for costs; and if the amount thereof be paid to the plaintiff or his attorney within four days from the service hereof, further proceedings will be stayed.*" It is not necessary in an action for a trespass or tort. It has been holden not to be necessary even in an action upon a bail bond or replevin bond; *Rouland v. Dakeyne*, 2 Dowl. 832. *Smart v. Lovick*, 3 Dowl. 34; or in debt on a statute for penalties. *Davis v. Lloyd*, 6 Dowl. 173, 3 Mees. & W. 69. Nor is it necessary, where the plaintiff's claim consists not only of a debt, but of a cause of action for damages also. *Perry v. Patchett*, 1 Cr. M. & R. 87. But in cases within the rule, the indorsement is necessary, although the defendant be an attorney. *Tomkins v. Chilcote*, 2 Dowl. 187. And where the indorsement left a blank for the amount of the costs, the court set aside the service of the writ for irregularity. *Truslove v. Whitechurch, et al.* 1 M. & Cr. 426. But a claim of £20 for "for debt, with interest thereon from the 10th

day of March last, and £3 for costs," has been holden to be sufficiently certain. *Coppelo v. Brown*, 3 Dowl. 166, S. P. *Sealy v. Hearn*, *Id.* 196. Where the indorsement required the defendant to pay the debt within four days from the arrest or service hereof, the court held it sufficient, as the words "arrest or," might be rejected as surplusage. *Sutton v. Burgess*, 1 Cr. M. & R. 770.

The court will not amend the indorsement, by altering the amount of the debt mentioned in it; and they have holden that a judge at chambers has no power to do so. *Trotter v. Bass*, 1 Bing. N. C. 516, 3 Dowl. 407. Nor will they allow it to be amended in any other respect. And if the attorney alter the writ himself, without getting it resealed before service, the writ will be void. See *Siggers v. Sansom*, 2 Dowl. 745. *Green v. Wilks*, 4 Dowl. 322.

*How sued out, &c.*] Write upon plain paper a præcipe in this, or the like form:—

*Middlesex: Writ of summons for John Nokes against Joseph Styles, of Somer's Place, Hendon, in the County of Middlesex, in an action [on promises].*

*A. B., attorney,*

—, 184—.

*Get a blank writ on parchment, and as many copies on paper as there are defendants, from the stationer's; fill up the writ very carefully, with the indorsements, &c., and the copies exactly in the same manner; then get the writ signed, (but see Burt v. Jackson, 2 Dowl. 747), and sealed. Care must be taken that there is no variance between the copy and the writ: at least, that the copy is correct. Chalkley v. Carter, 4 Dowl. 480. Edwards v. Collins, 5 Dowl. 227. But no advantage can be taken of any variance between the writ and the præcipe. See Boyd v. Durand, 2 Taunt. 161. Usborne v. Pennell, 2 Dowl. 801.*

*How served.*] By stat. 2 W. 4, c. 39, s. 1, "every writ of summons may be served in the manner heretofore used, in the county therein mentioned, or within 200 yards of the border thereof, and not elsewhere;" and the manner "heretofore used," was by serving a true copy of the writ on the defendant personally. *Vide infra*. And the writ itself must be shown to him if he demand to see it, otherwise the service will be set aside for irregularity, whether the demand be made at the time of the service, (*Thomas v. Pearce*, 2 B. & C. 761. *Petit v. Ambrose*, 6 M. & S. 274), or within a reasonable time afterwards. *Westley v. Jones*, 5 Moore, 162. But merely leaving it with the defendant's shopman, *Thompson v. Pheney*, 1 Dowl. 441. See *Rhodes v. Innes*, 7 Bing. 329, or at his house or place of

business, *Digby v. Thompson*, 1 *Dowl.* 263, or at a house where his letters are left for him, *Sainsbury v. Thorpe*, 9 *Dowl.* 183, or at the chambers of his agent in London, *Kerr v. Miller*, 8 *Dowl.* 322, or serving it on his attorney, *Parmeter v. Reed*, 7 *Dowl.* 545, or sending it by post, if the defendant refuse to take in the letter, *Redpath v. Williams*, 3 *Bing.* 443. And see *Arrowsmith v. Ingle*, 3 *Taunt.* 234, or even if he receive it, *Atkinson, v. Howell*, 7 *Mees. & W.* 213, 10 *Law, J.* 64 *ex.*, will not be sufficient. Where the copy was personally offered to the defendant, it has been holden, that placing and leaving it on his shoulder, *Bell v. Vincent*, 7 *D. & R.* 233, or leaving it in his house, *Bates v. Maddison*, 1 *Tidd*, 168, was sufficient; but merely tendering the copy, and upon its being refused, taking it away, will not be deemed good service. *Pigeon v. Bruce*, 8 *Taunt.* 410. If it be doubtful, upon the affidavits on both sides, whether the service was personal or not, the court will not interfere, or set aside the proceedings. *Morris v. Coles*, 2 *Dowl.* 79. And where a personal service is sworn to, upon the part of the plaintiff, in entering an appearance for the defendant, although the party who served the writ may possibly have been mistaken in the identity of the defendant, yet the court will not set aside the proceedings, unless the defendant make out satisfactorily by affidavit, not only that the writ was not served upon him, but that he did not afterwards receive it, and had not even any knowledge of it. *Phillips v. Ensell*, 9 *Dowl.* 684. *Herbert v. Darley*, 4 *Dowl.* 726. *Williams v. Piggott*, 1 *Mees. & W.* 574.

Formerly the writ must have been served within the county, &c., to the sheriff of which it was directed; *Chase v. Joyce*, 4 *M. & S.* 412. *Colwell v. Vestris*, *Id.* 413 *n.* *Williams v. Gregg*, 7 *Taunt.* 233. *Willis v. Pendrill*, 2 *New Rep.* 167; but a service of the writ out of the proper county could not be objected to, unless the defendant could swear that the place where the writ was served was not upon the confines of the county, and that there was no dispute as to the boundaries. *Storer v. Rayson*, 3 *B. & C.* 158. And see *Coulson v. King*, 2 *Crompt. & J.* 474. But the matter is now rendered certain; for by stat. 2 *W. 4*, c. 39, s. 1, the writ must be served within "the county therein mentioned, or within 200 yards of the border thereof, and not elsewhere;" otherwise the court will set aside the service for irregularity. In several parts of England, there are certain districts and places, parcel of some one county, but wholly situate within and surrounded by some other county; and by stat. 2 *W. 4*, c. 39, s. 20, after reciting this, it is enacted, "that every such district and place shall and may, for the purpose of the service and execution of every writ and process, whether mesne or judicial, issued out of either of the said courts, be deemed and taken to be part, as well of the county wherein such district or place is so situate as aforesaid, as of

the county whereof the same is parcel; and every such writ and process may be directed accordingly, and executed in either of such counties." A country borough, surrounded by a county, however, is not within the meaning of this section. *Davis v. Sherlock*, 7 Dowl. 530.

The writ must be served within four months from the date of it, the day of the date being reckoned inclusive. See 2 W. 4, c. 39, s. 10. It may be served at any time of the day, even after 11 o'clock at night. *Upton v. Mackenzie*, 1 D. & R. 172. *Priddee v. Cooper*, 1 Bing. 66. It cannot however be served on a Sunday; such service would be wholly void. *Taylor v. Phillips*, 3 East, 155. It may be served after the four months, however, if the defendant consent to accept it as good service. *Coates v. Sandy*, 9 Dowl. 381.

If it be found impracticable to serve the defendant personally, and it appear from circumstances that he keeps out of the way to avoid being served, in that case the plaintiff should proceed for the purpose of obtaining a *distringas*, as directed *post*, p. 110, or proceed to outlawry, as directed, *post*, p. 119.

By stat. 2 W. 4, c. 39, s. 1, the person serving such writ is required to indorse on the same, the day of the month and week of the service thereof. And by R. G. M. 3 W. 4, s. 3, "the person serving such writ shall, within three days at least after such service, indorse on such writ the day of the week and month of such service; otherwise the plaintiff shall not be at liberty to enter an appearance for the defendant according to the statute; and every affidavit upon which such appearance shall be entered, shall mention the day on which such indorsement was made." It may be necessary to mention that such affidavit cannot be sworn before the plaintiff's attorney, or his clerk. R. G. H. 2 W. 4, s. 3.

*Alias and Pluries Writs.*] The writ of summons is in force for four calendar months; after which of course it cannot be served. *Ante*, p. 102, 103, and *supra*. But it may be continued by *alias* or *pluries* writs, (2 W. 4, c. 39, s. 10), from time to time, until the defendant shall be served personally, or such circumstances arise as may satisfy the court that he keeps out of the way to avoid service, and induce them to award a *distringas*. And this may be done at any time, unless the writ be intended to prevent the operation of the statute of limitations. *Nicholson v. Rowe et al.* 2 Cr. & M. 469. *Norman v. Winter*, 7 Dowl. 304. *Pearce v. Swain*, 10 Law. J. 144 *ex.* Or the plaintiff may abandon a writ issued into one county, and sue out an *alias* or *pluries* writ into another county, if he think it desirable; in which case, the defendant must be described in the writ of *alias* or *pluries*, as late of the place of which he was described in the first writ of summons. R. G. M. 3 W. s. 6. So if the first writ were served upon a

wrong person, the plaintiff may sue out an *alias* upon it against the right defendant, even although the person served may have appeared, &c. *Clarke v. Johnson*, 3 D. & R. 254, 2 B. & C. 95. And it is not necessary that the first writ should be returned before you sue out the *alias*, or the *alias* returned before you sue out the *pluries*, unless the writ have been for the purpose of saving the statute of limitations or of proceeding to outlawry. *Gregory v. Des Anges*, 5 Dowl. 193.

The following is the form of the *alias* and *pluries* :

*Victoria*, [&c.] *To Joseph Styles of — in the county of —, late of — in the county of [the original county], greeting: We command you as before [or often] we have commanded you, [&c. as in the ordinary form.]* R. G. M. 3 W. 4, s. 7. These writs are sued out in the same manner as the first writ of summons. See *ante*, p. 106.

*Defects in the Writ.*] If the plaintiff or his attorney shall omit to insert in, or indorse on, any writ or copy thereof, any of the matters required by stat. 2 W. 4, c. 39, to be by him inserted therein or indorsed thereon, such writ or copy shall not on that account be held void, but it may be set aside as irregular, upon application to be made to the court out of which the same shall issue, or to any judge. R. M. 3 W. 4, s. 10. And therefore if an irregular writ or copy be served in vacation, the defendant should apply to a judge at chambers to set it aside for irregularity, if by waiting until the term, the time limited for making the application would elapse. *Cox v. Tullock*, 1 Cr. & M. 531. And in all cases, whether in term or vacation, the application to set aside the writ or copy, or the service, must be made within the time limited for the defendant's appearance, *Child v. Marsh*, 6 Dowl. 576. *Tyler v. Green*, 3 Id. 439. *Edwards v. Collins*, 5 Id. 227, even in the case of a service in a wrong county. *Davis v. Skerlock*, 7 Dowl. 530. If the irregularity be in the copy served, the application should be to set aside the service, and not the copy merely; *Hall v. Redington*, 9 Law. J. 100 *ex.*; or it may be to set aside "the copy or service." *Id.* And where the defect is in the service, it has been holden by Williams, J., that it is no objection that the application is to set aside the copy and service; for if the latter be bad, the former is useless. *Argent v. Reynolds*, 6 Dowl. 480.

It is necessary to say that the court will not amend a writ of summons, unless it appear that the debt will otherwise be barred by the statute of limitations, *Partridge v. Wallbank*, 1 Mees. & W. 316. *Per. Parke B.*, M. S. E. 1834, or where the amendment is in a mere variance between the writ and the præcipe. *Kirk v. Dolby*, 6 Mees. & W. 636. They have refused to allow even the indorsement of debt to be amended, in the



sum mentioned in it, to enable the parties to proceed to a trial before the sheriff. *Trotter v. Bass*, 1 Bing. N. C. 516. Where a writ of summons was directed to the defendant in Middlesex, but the plaintiff's attorney afterwards, ascertaining that the defendant resided in Surrey, substituted the word "Surrey" for "Middlesex," and served the writ, without having it resealed: the court said that the attorney had been guilty of gross misconduct, and they set aside the proceedings on payment of the debt without the costs. *Siggers v. Sansom*, 2 Dougl. 745. And if the writ, after being altered, be resealed, the teste must also be altered, to make it correspond with the time of resealing. *Knight v. Warren*, 7 Dougl. 663.

## SECTION II.

*Distringas.*

*In what cases.*] By stat. 2 W. 4, c. 39, s. 3, in case it shall be made appear by affidavit, to the satisfaction of the court out of which the process issued, or, in vacation, of any judge of the courts of law at Westminster, that any defendant has not been personally served with a writ of summons, *and* has not, according to the exigency thereof, appeared to the action, *and* cannot be compelled so to do without some more efficacious process: then and in any such case it shall be lawful for such court or judge to order a writ of *distringas* to be issued, directed to the sheriff of the county wherein the dwelling-house or place of abode of such defendant shall be situate, or to the sheriff of any other county, or to any other officer to be named by such court or judge, in order to compel the appearance of such defendant.

The affidavit, for the purpose of obtaining a *distringas*, therefore, must be such as to satisfy the court or judge of three things: 1st, That the defendant has not been personally served with the writ of summons; 2dly, That he has not appeared to the action; and 3dly, That he cannot be compelled to appear, unless a *distringas* be issued. The affidavit usually expected, and indeed required, is to this effect: That the attorney or his clerk called at the residence of the defendant, for the purpose of serving him with the writ of summons, having then the writ and copy with him for that purpose, that he there saw a servant, &c. of the defendant, of whom he inquired for the defendant, and at what time he was most likely to be met with, and the answers he received, &c.: That he then informed the servant of the purpose for which he called, and appointed to call on another day at a certain hour, when the defendant was most likely to be at home: That he called again at the time appointed,

having the writ and copy with him, but could not see the defendant, (stating what passed upon the occasion); that he then made a second appointment in like manner, for a subsequent day and hour, and called accordingly; but that he again failed to see the defendant, and upon this last occasion he left a copy of the writ with the servant. Besides all this, the affidavit must shew circumstances, from which the court or judge may fairly infer that the defendant keeps out of the way, to avoid being served with process, and the deponent must add his belief that he does so. The affidavit must also state a recent search at the proper office, after the expiration of eight days from the time the copy of the writ was left, as above mentioned, and that the defendant has not entered an appearance.

The early cases upon this subject, and before the practice was settled as above-mentioned, cannot be depended upon, and it is unnecessary to notice them. It is now established, that there must be three calls; whether by the same person or not, is immaterial. *Smith v. Good*, 2 Dowl. 398. They must be on different days, *Cross v. Wilkins*, 1 Har. & W. 516, 4 Dowl. 279. but see *White v. Western*, 2 Dowl. 451, cont; unless it appear that the person calling in the morning was induced to make an appointment for the evening of the same day, by the person answering him stating that the defendant would be likely to be seen at that time, or the like. *Per Patteson, J. MS. M. 1841*. And it must appear that it was at the place of the defendant's residence the calls were made, unless under particular circumstances. See *Moody v. Morgan*, 7 Dowl. 144. And, therefore, where the affidavit termed it "the last supposed place of his abode," *Esdaile v. Marshall*, 6 Dowl. 400, 4 Bing. N. C. 172, or the last place of his abode, he being abroad, *Grover v. Hindmarsh*, 7 Dowl. 607, *Beverley v. Christie*, 10 Law. J. 128, *ex.*, it was deemed insufficient. If the affidavit state that the present abode is unknown, at least it must show the endeavours which have been made to find it, *Greenwood v. Selden et al.* 9 Dowl. 72, and the deponent's belief that he is in this country. *Norman v. Winter*, 4 Bing. N. C. 637, 8 Law. J. 179, *cp.* Appointments must be made upon the first two occasions of calling, and the day and hour mentioned at which the clerk will again call. *Wills v. Bowman*, 2 Dowl. 413. *Johnson v. Disney, Id.* 400. *Atkinson v. Clean*, 5 Dowl. 252. *Newman v. Hickman*, 9 Dowl. 546, but see *Hickman v. Dallimore*, 1 Har. & W. 524. A copy of the writ must be left with the servant, &c. *Street v. Ld. Alvanley*, 1 Cr. & M. 127. *Hooker v. Tooke*, 1 Hodg. 315, on the last of the three occasions. *Mason v. Lee*, 5 Nev. & M. 240. *Hill v. Moule*, 1 Cr. & M. 617. *Anon.* 1 Har. & W. 380, but see *Webb v. Jenkins*, 7 Dowl. 135. And circumstances must also be stated, sufficient to satisfy

the court that the defendant keeps out of the way, for the purpose of avoiding being served with the writ of summons; *See Price v. Bower*, 2 Dowl. 1. *Waddington v. Palmer*, *Id.* 7. *Simpson v. Lord Graves*, *Id.* 10. *Smith v. Hill*, *Id.* 225. *Moon v. Thynne*, 3 Dowl. 153. *Evans v. Fry*, 3 Dowl. 581, 1 *Har. & W.* 185. *Houghton v. Howarth*, 4 Dowl. 749; and the deponent must add his belief that he does so, *Anon.* 1 Dowl. 513, unless indeed it appear sufficiently from the circumstances stated that the defendant does keep out of the way. *Channing v. Cross*, 9 Dowl. 118. If it appear that he is abroad, *Fraser v. Case*, 1 Dowl. 725. *Grover v. Hindman*, 7 Dowl. 607. *Beverley v. Christie*, 10 *Law. J.* 128, *ex.*, 9 Dowl. 293, or merely that he is absent from home, unless it show that it was for the purpose of avoiding the service or execution of process, *see Archer v. Brindley*, 9 Dowl. 38, the court will not award the *distringas*. If however the circumstances thus stated be very strong and convincing of themselves, the court will not be very particular as to the calls or appointments above mentioned. *See Johnson v. Disney*, 2 Dowl. 400. *Hickman v. Dallimore*, 4 Dowl. 278, 1 *Har. & W.* 524. Also, if the *distringas* be applied for, not for the purpose of compelling an appearance, but for the purpose of proceeding to outlawry, the court will not be very particular as to the calls or appointments, if it appear that several ineffectual attempts have been made to serve the defendant personally with the writ of summons. *Jones v. Price*, 2 Dowl. 42. *Hewitt v. Melton*, 1 *Cr. & M.* 720. *Harding v. Manners*, 2 *Har. & W.* 80. The application also, or even the search for the appearance, should not be made until after the expiration, of eight days at least from the time of leaving the copy of the writ; for the defendant, if he be willing to obey the writ, has that time given him to do so; *Brian v. Stretton*, 1 *Cr. & M.* 74; and the affidavit must state a search after that time, *Waugh v. Pry*, 7 Dowl. 376, *Spence v. Barker*, 8 Dowl. 296, and a positive statement that no appearance has been entered. *Hocker v. Townsend*, 1 *Hodg.* 204. This application may be made, however, after the writ of summons has expired, *Norman v. Winter*, 5 *Bing. N. C.* 279. *Bromage v. Ray*, 9 Dowl. 559, or upon an alias sued out after the first writ of summons had expired. *Pearce v. Swain*, 7 *Mees. & W.* 543.

In term time, this application must be made to the court, and they grant a rule absolute in the first instance; in vacation, an order to the like effect may be obtained upon an *ex parte* application to a judge at chambers. The court will not set aside a judge's order for a *distringas*, merely for an alleged insufficiency of the affidavit on which it was granted. *Gale v. Winks*, 5 Dowl. 348, but *see Esdaile v. Marshall*, 3 *Bing. N. C.* 172. Nor will they set aside the *distringas*, for any mistake

in the copy of the summons left, *Tyser v. Brian*, 2 Dowl. 640, or because a copy of the summons was not left, *Smith v. Macdonald*, 1 Dowl. 688, or because the defendant was abroad at the time it was left. *White v. Johnson*, 1 Gale, 108.

*How sued out.*] Having drawn up the rule for the distringas, get a blank copy of the writ on parchment, and another on paper, at the stationer's; fill them up and indorse them correctly, vide infra; write out a præcipe also; take these and the rule to the master's office, and the clerk there will sign the writ and file the præcipe; then get the writ sealed; and deliver it, with the copy, at the office of the sheriff, to whom it is directed, and he will cause it to be executed. See a form of the writ in the Appendix.

*Teste and return of the writ.*] The writ shall bear teste "on the day of the issuing thereof, whether in term or vacation; and shall be made returnable on some day in term, not being less than fifteen days after the teste thereof." 2 W. 4, c. 39, s. 3, and see *Id.* s. 12.

*How indorsed.*] The writ and copy are indorsed in precisely the same manner as the writ of summons. See *R. G. H.* 2 W. 4, r. 2: *R. G. M.* 3 W. 4, s. 5. ante p. 103. *Gale v. Winks*, 5 Dowl. 348, 3 Bing. N. C. 294. The following may be the form:

*This writ was issued by John Smith, of No. 3, Elm-court, Temple, attorney for the within-named John Nokes.*

Or if by an agent: "*This writ was issued by John Smith, of No. 3, Elm-court, Temple, attorney, agent for James Walker, of Beverley, in the East Riding of the county of York, attorney for the within-named John Nokes.*

Or if by the plaintiff in person: "*This writ was issued in person by John Nokes, who resides at,*" [mention the city, town or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such.]

Further indorsement required on the copy of the writ, by *R. G. H.* 2 W. 4, r. 2, where the action is for a debt: "*The plaintiff claims [£30. 10s.] for debt, and [£5. 4s.] for costs; and if the amount thereof be paid to the plaintiff [or his attorney] within four days from the service hereof, further proceedings will be stayed.*"

*Defects in the writ.*] By *R. G. M.* 3 W. 4, s. 10, "if the plaintiff or his attorney shall omit to insert in, or indorse on any writ or copy thereof, any of the matters required by stat. 2 W. 4, c. 39, to be by him inserted therein or indorsed thereon, such writ or copy shall not on that account be held void, but may be set aside as irregular, upon application to be made to the court out of which the same shall issue, or to any judge." See ante, p. 109. Where there was no indorse-

ment of the claim for debt and costs on the *distringas* or copy, the court set them aside for irregularity, although such indorsement was regularly made upon the writ of summons. *Gale v. Winks*, 5 *Dowl.* 348, 3 *Bing. N. C.* 294. Where the writ was executed on the 30th March, and an application to set it aside for an omission in the indorsement was not made until the 17th April, the court held it to be too late. *Wright v. Warren*, 2 *Dowl.* 724. Where a motion to set aside a *distringas*, for a variance in the name of the defendant between it and the writ of summons, was not made until after eight days from the return of the *distringas*, the court held that it was too late; as the variance was an irregularity only, and did not render the writ void. *Swift v. Wright*, 5 *Mees. & W.* 618, 9 *Laur.* J. 6 *ex.*

*How executed, and proceedings thereon.*] The sheriff, in execution of this writ, distrains goods of the defendant to the value of 40s. Besides which, "the writ of *distringas* and notice, or a copy thereof, shall be served on the defendant, if he can be met with; or if not, shall be left at the place where such *distringas* shall be executed." 2 *W.* 4, c. 39, s. 3. Where the copy left contained no date to the teste, *Patteson, J.* refused to set aside the writ, the latter having been executed on the 28th August, and the application not made until the 10th Nov.; he said that the omission was an irregularity only, and the application therefore too late; if indeed the omission had been in the writ itself, it might have been different. *Quilters v. Neely*, 9 *Dowl.* 139.

On or after the return day of the *distringas*, get the sheriff to return the writ. If he return that he has distrained and levied issues, then, after the expiration of eight days inclusive from the return of the writ, as mentioned in the notice at the foot of the *distringas*, the plaintiff may enter an appearance for the defendant: and in such a case, it is not necessary to have an affidavit, *Page v. Hemp*, 4 *Dowl.* 203, or to obtain the leave of the court, *Johnson v. Smealy*, 1 *Dowl.* 526. *Tucker v. Brand*, 4 *Dowl.* 411, unless perhaps where less than 40s. have been levied. *Jones v. Dyer*, 2 *Dowl.* 445.

But if the sheriff return *non est inventus* and *nulla bona*, and the defendant do not appear at or within eight days inclusive after the return of the writ, the plaintiff, if he do not wish to proceed to outlawry, "upon making it appear by affidavit, to the satisfaction of the court out of which the *distringas* issued, or, in vacation, of any judge of either of the said courts, that due and proper means were taken and used, to serve and execute such writ of *distringas*, may have leave to enter an appearance for the defendant, and to proceed thereon to judgment and execution." 2 *W.* 4, c. 39, s. 3. The sheriff's officer, who had the execution of the writ, must make affidavit there-

fore of the means he took and used to serve and execute the same. *Waite v. Cook*, 9 Dowl. 139. Merely, stating, generally, that due diligence had been used to execute the writ, but that no residence or property of the defendant could be found, *Saunderson v. Bourn*, 2 Dowl. 338, or that he was informed that the defendant had assigned his property, *Balgay v. Gardner*, 2 Dowl. 52, or that he was told that the defendant lived in furnished lodgings, and that there was nothing there of his to take, *Cornish v. King*, 2 Dowl. 18, but see *Thompson v. Furney*, 9 Dowl. 344, without stating specifically the particular means used by him to effect the execution of the writ or service, have been holden insufficient; the means must be stated, before the court can be satisfied that they were due and proper. See *Copeland v. Nevill*, 4 Dowl. 51. And where the officer who had the execution of the writ died, and the motion was made upon an affidavit of what he had stated as to his endeavours to execute the writ, Littledale, J. refused to receive it, saying that he could not act upon hearsay evidence. *Daniels v. Varsity*, 3 Dowl. 26. Where the affidavit stated three attempts to execute the writ at the defendant's "present or late place of abode," without negating deponent's knowledge of any other place of abode, it was holden insufficient. *Scarborough v. Evans*, 2 Dowl. 9. But where the officer swore that at three different times when he went to the defendant's house to execute the writ, the doors were barricaded against him, and on one occasion a servant from a window told him he knew the object of his coming; and the officer, not being able to obtain entrance, fixed a copy of the writ on the door: this was holden sufficient. *Tring v. Gooding*, 2 Dowl. 162, see *Whishaw v. Brown*, 9 Dowl. 123 S. P. So, where the defendant was a lunatic, and his keeper refused to allow him to be seen, so that he could not be served with a copy of the distringas: the court allowed the plaintiff to enter an appearance for him. *Starkie v. Skilback*, 6 Dowl. 52.

## SECTION III.

## Appearance.

An appearance is entered, by taking to the proper officer in the master's office a memorandum on plain paper, in one of the following forms; See 2 W. 4, c. 39, sch. No. 2.; which memorandum must be dated on the day it is delivered. 2 W. 4, c. 39, s. 2.

Where the defendant appears in person:—

<i>John Nokes, plaintiff,</i> <i>against</i> <i>Joseph Styles, [and others.]</i>	{	<i>The defendant, Joseph Styles,</i> <i>appears in person.</i>
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Where the defendant appears by attorney :—

<i>John Nokes, plaintiff, against Joseph Styles, [and others]</i>	{	<i>E. F. attorney for Joseph Styles, appears for him.</i>
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Where the plaintiff appears for the defendant.

<i>Joseph Nokes, plaintiff, against Joseph Styles, [and others]</i>	{	<i>G. H. attorney for the plaintiff, appears for the defendant, Joseph Styles, according to the statute.</i>
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If the appearance be not in one or other of the first two of these forms, the plaintiff may treat it as a nullity, and enter an appearance for the defendant. *Warren v. Love*, 7 Dowl. 602.

If there be any defect in this memorandum, when filed, the party should move to amend it; if instead of doing so, he enter a fresh appearance, it will be irregular. *Bate v. Bolton*, 2 C. M. & R. 365.

If an attorney undertake to appear for the defendant, the court will compel him to do so, *R. M.* 1654, s. 10, whether the undertaking be merely verbal, *Anon.* 2 Chit. 36, or in writing. See *Anon.* 1 Chit. 201 (a). *Morris v. James*, 6 Dowl. 514. And he must enter it within the time limited for that purpose. *R. G. T.* 2, W. 4, s. 31, *vide infra*.

*By defendant.*] If the defendant be served personally with the copy of a writ of summons, he must enter an appearance within 8 days after service, inclusive of the day of the service; otherwise the plaintiff may enter an appearance for him, and proceed in the action. 2 W. 4, c. 39, s. 16, & sch. No. 1. See *Willett v. Wilson*, 2 Crompt. & J. 356. And his appearance will be good, although the writ of summons may have then expired. *Richardson v. Daley et al.*, 7 Dowl. 25. If he enter the appearance within the time above limited, the plaintiff is not obliged to wait until the 8 days have expired, to declare against him, but he may declare immediately. *Morris v. Smith*, 1 Gale, 187.

By appearing, the defendant waives all irregularity in the process. *Humble v. Bland*, 6 T. R. 255. *Anon.* 1 Chit. 129 (a).

*By plaintiff for defendant.*] If the defendant have been personally served, and do not enter an appearance within the time limited for that purpose, as above mentioned, the plaintiff may enter it for him. *Vide supra*. For this purpose, an affidavit of the service of the writ, in the form following, must be made, and filed with the officer, at the same time you deliver to him a memorandum of the appearance, as above

mentioned. It may be necessary to mention that this affidavit cannot be sworn before the plaintiff's attorney or his clerk. *R. G. H. 2 W. 4, s. 3.*

*In the Queen's Bench.*

*Between John Nokes, Plaintiff,  
and  
Joseph Styles, Defendant.*

*John Dunn, clerk to Henry Smith, of Furnival's Inn, Holborn, in the county of Middlesex, gentleman, attorney for the above-named plaintiff, maketh oath and saith, that he did, on the ——— day of ——— instant, personally serve Mr. Joseph Styles the above named defendant with a true copy of a writ of summons, which appeared to this deponent to be regularly issued out of this honourable court, at the suit of the above named plaintiff, against the above named defendant, and bearing date the ——— day of ——— last past. And this deponent further saith, that after having so served the said defendant with the said writ as aforesaid, this deponent, on the ——— day of the said month of ———, did indorse on the said writ the day of the week and month of such service; and which said indorsement is in the words and figures following; that is to say ["served the defendant with a copy of this writ, on Friday the ——— day of ——— 1842, John Dunn,"] or as the indorsement may be. See ante, p. 108.*

*Sworn, &c.*

The indorsement here mentioned, must be made on the summons, within three days at most after the writ has been served, otherwise the plaintiff shall not be at liberty to enter an appearance for the defendant; and the affidavit of service "shall mention the day on which such indorsement was made." *R. G. M. 3, W. 4, s. 3.* Where the defendant, on being served with a copy of a writ, snatched the writ itself out of the hands of the person who served him, and kept it, so that this indorsement could not be made: the court, upon application, granted a rule *nisi* for him to deliver up the writ, or, in case of his not doing so, that an appearance should be entered for him without such indorsement or affidavit thereof. *Brook v. Edridge, 3 Dowl. 647.*

It is only in cases where the defendant has been personally served with a summons, that the plaintiff can thus enter an appearance for him. But where there was some difficulty in making an affidavit of personal service, and the plaintiff proceeded to obtain a rule for a *distringas*, but before that writ issued, the defendant admitted that he had been served with the summons: upon application, Coleridge, J. allowed the plaintiff to enter an appearance for the defendant. *Saunders v. De Chastelain, 5 Dowl. 154.* Where the defendant entered an appearance, but not in time, and the plaintiff on the day after,



not knowing that an appearance had been already entered, entered an appearance for the defendant, and afterwards filed and gave notice of declaration, signed judgment, gave notice of and executed a writ of inquiry, and then took the defendant in execution on a *ca. sa*: the defendant then applied to be discharged, on the ground of the plaintiff's irregularity in entering an appearance for the defendant, an appearance being already entered; but it was holden that he was too late in his application; on an affidavit of merits, however, the judgment was set aside upon payment of costs. *Strange v. Freeman*, 5 Dowl. 407, and *see Alsager v. Crisp*, 9 Dowl. 353.

In the court of Queen's Bench, formerly, the plaintiff must have entered a common appearance or filed common bail for the defendant, either in the term in which the writ was returnable, or in the next following term; after which he was not allowed to enter or file it; *Smith v. Painter*, 2 T. R. 719. *Bugden v. Burr*, 10 B. & C. 457; except in the case of a cognovit. *Davis v. Hughes*, 7 T. R. 206. And the same in the Common Pleas. And the practice is still the same, except that the day of the service of the writ of summons is now deemed equivalent to the return day of the old process; and that where the writ is served in vacation, the plaintiff it should seem would be allowed to enter an appearance at any time within the second term following. In the Exchequer a common appearance may be entered at any time within four terms. *Cook v. Allen*, 1 Cr. & M. 350.

*After a distringas.*] If the defendant have not been served personally, but a distringas have been awarded and executed, then, if he do not enter an appearance within eight days inclusive after the return day of the distringas, the plaintiff may enter an appearance for him. 2 W. 4, c. 39, s. 16, & Sch. No. 3. And it is not necessary, it seems, to produce to the officer an affidavit of the execution of the writ by the sheriff's officer; the sheriff's return is sufficient proof of the levy. *Page v. Hemp*, 2 Cr. M. & R. 494.

But if the sheriff return *non est inventus* and *nulla bona*, and the defendant do not appear within eight days after the return day of the writ, then the plaintiff, (if he do not wish to proceed to outlawry,) "upon making it appear by affidavit to the satisfaction of the court out of which the distringas issued, or, in vacation, of any judge of one of the courts of law at Westminster, that due and proper means were taken and used to serve and execute such writ of distringas, may have leave to enter an appearance for the defendant, and to proceed thereon to judgment and execution." 2 W. 4, c. 39, s. 8. As this is an *ex parte* proceeding, the court require that the affidavit should state specifically the means that have been used to serve and execute the writ, in order that they may judge whether they

were "due and proper," *Copeland v. Nevill*, 5 Nev. & M. 172, 1 Har. & W. 374, *Belgay v. Gardner*, 2 Dowl. 52, and that they may also be satisfied that after a bonâ fide diligent search by the officer, he could not find the person or goods of the defendant. See *Scarborough v. Evans*, 2 Dowl. 9. *Cornish v. King*, *Id.* 18. *Saunderson v. Bourn*, 2 Cr. & M. 515. See ante p. 114, 115. If the rule be obtained, you produce it to the officer, as his authority to enter the appearance.

## SECTION IV.

## Outlawry.

*In what cases.*] If a defendant cannot be found, so as to be served with process, the plaintiff may proceed to outlawry against him. And where an action *ex contractu* is against two defendants, one of whom is served with process, and enters an appearance for himself, but refuses to do so for the other, and the other cannot be found, so that he may be served: there is no mode of proceeding, excepting outlawry, by which the plaintiff can declare alone against the defendant who has appeared. See *Goldsmith v. Levy*, 4 Taunt. 299. *Solly v. Forbes*, 2 Moore, 90. *Abbott v. Maitland*, 8 Taunt. 187. A peer or member of parliament, however, cannot be outlawed. See *Cassidy v. Stewart*, 10 Law, J., 57 cp., 9 Dowl. 366.

*Process.*] Formerly, in order to outlaw a defendant in a civil action, the action must have been commenced by original writ, and followed up by a *capias*, *alias* and *pluries*; and as these writs did not lie in the Exchequer, it was holden that there could be no proceeding to outlawry in that court. *Horton v. Peake*, 1 Price, 306. See *Jones v. Price*, 2 Dowl. 42. But now it is not necessary to commence the action in any other than the ordinary manner, by summons, in order to proceed to outlawry; for by the stat. 2 W. 4, c. 39, s. 5, "upon the return of *non est inventus* and *nulla bona* as to any defendant, against whom a writ of *distringas* shall have issued (see ante, p. 114), whether such writ of *distringas* shall have issued against such defendant only, or against such defendant and any other person or persons, it shall be lawful, until otherwise provided for, to proceed to outlaw or waive such defendant by writs of *exigi facias* and proclamation, and otherwise, in such and the same manner as may now be lawfully done upon the return of *non est inventus* to a *pluries capias ad respondendum* issued after an original writ;" provided that "no such writ of *distringas* shall be sufficient for the purpose of outlawry or waiver, if the same be returned within less than fifteen days

after the delivery thereof to the sheriff or other officer, to whom the same shall be directed." Care must be taken, therefore, not to rule or call upon the sheriff to return the *distringas*, until fifteen days at least shall have elapsed from the time the writ was delivered to him; or if there be any likelihood of his voluntarily returning the writ before that time, you should give him notice of your intention to proceed to outlawry, and require him not to do so.

In order to proceed to outlawry, therefore, sue out a writ of summons, as in ordinary cases; and much less endeavours to find the defendant, for the purpose of serving him with it, will be a sufficient ground for application for a *distringas* in order to proceed to outlawry, than is required in ordinary cases where it is designed to enter an appearance for the defendant. *See ante*, p. 112; and *see Jones v. Price*, 2 Dowl. 42. *Harding v. Manners*, 2 Har. & W. 80. *Hewitt v. Milton*, 1 Cr. & M. 720. And where a writ of summons *alias* and *pluries* had been sued out, returned and entered of record, for the purpose of saving the statute of limitations, it was holden that there was no objection to continuing these writs by a writ of *distringas* with a view to outlawry. *Reay v. Youde*, 2 Mees. & W. 188. But where in executing the *distringas* a notice was left for the defendant that he was distrained upon, in consequence of his not having appeared to the writ of summons, and that in default of his appearance, an appearance would be entered for him: the court held, that after this, the plaintiff could not treat the *distringas* as a preliminary to outlawry. *Vere v. Gouvar*, 3 Bing. N. C. 503. If, however, there be any mere irregularity in the writ or its indorsements, that will be no ground for setting aside the subsequent outlawry. *Lewis v. Davison*, 3 Dowl. 272.

*Exigi facias.*] Upon the *distringas* returned *non est inventus* and *nulla bona*, you may sue out the writ of exigent; *see the form in the Appendix*. By this writ the sheriff is required to demand the defendant from county court to county court, until he shall be outlawed, if he do not appear, or to take him if he do appear; and in obedience to the writ, the sheriff must exact him at five successive county courts, if so many occur between the time of the delivery of the writ and the return of it. If there be not five courts within that time, the plaintiff must rule the sheriff to return the exigent, and must then sue out an *allocatur exigent*, which is in the nature of an *alias* writ, and upon this the sheriff will exact the defendant the number of times that remained deficient under the former writ. *See the form of the allocatur exigent, in the Appendix*.

By stat. 2 W. 4, c. 39, s. 5, every writ of "exigent, proclamation, and other writ subsequent to the *distringas*, shall be made returnable upon a day certain in term; and every such first writ of exigent and proclamation shall bear teste on the

day of the return of the *distringas*, whether such writ be returned in term or vacation; and every subsequent writ of exigent and proclamation, shall bear teste on the day of the return of the next preceding writ." Although the writ of exigent, however, must bear teste on the day of the return of the *distringas*, it is not necessary that it should be actually sued out on that day; *Lewis v. Davison*, 2 Dowl. 272, 275; and the like as to the other writs. Where a writ of *capias* was issued against two defendants, upon which one was arrested, and put in bail; writs of exigent and proclamations were then sued out against both, and a writ of *supersedeas* was delivered to the sheriff as to the one who had appeared; and the sheriff thereupon proceeded to outlaw the other: the court held this proceeding to be regular. *Gent v. Abbott*, 2 Moore, 87. See *Haigh v. Conway*, 15 East, 1.

Under this writ, the sheriff is bound to exact or demand the defendant at five consecutive county courts, if so many occur during the time the writ is in force; see *Taylor v. Waters*, 3 B. & C. 353; and the writ must be actually in his hands, at the time the defendant is demanded. *Volet v. Waters*, 3 D. & R. 55. But if five county courts do not occur pending the writ, the sheriff must exact the defendant the remaining times, under the *allocatur exigent*, as above mentioned. And the *quinto exactus* must be at least one month after the third proclamation, as hereinafter mentioned, otherwise the outlawry will be altogether void. *Taylor v. Waters*, *supra*.

*Writ of proclamations.*] A writ of proclamations must also issue at the same time as the exigent, whereby, after reciting the writ of exigent, the sheriff is commanded to proclaim the defendant on three several days according to the form of the statute, that he may render himself, &c.; see the form in the *Appendix*; and by the statute 31 El. c. 3, s. 1, one of these proclamations must be at the county court or hustings, one at the general quarter sessions, and one other of these proclamations shall be made one month at least before the *quinto exactus*, on a Sunday, by affixing the same, in writing, ["on or near to the doors of all the churches and chapels," 1 Vict. c. 45, s. 2,] of the parish where the defendant was dwelling at the time of the awarding of the exigent. Although in strictness, therefore, the writ of proclamations should be directed to the sheriff of the county where the defendant was then residing, and if not done so, it is a nullity, *Rayer v. Cooke*, 3 B. & C. 529, yet in practice it is usually directed to the same sheriff to whom the exigent is directed, who then executes and returns both. It is tested and returnable in the same manner as the exigent. *Vide supra*, & 31 El. c. 3, s. 1. If there be

not a month between the third proclamation and the *quinto exactus*, as above mentioned, the outlawry will be void, and the court will set it aside. *Taylor v. Waters*, 2 B. & C. 353, and see *Volet v. Waters*, 3 D. & R. 55. *Lewis v. Davison*, 3 Dowl. 272.

*Sheriff's return.*] Upon the writ of exigent and proclamation being returnable, the sheriff upon application will return the exigent, see *R. v. Almon*, 5 T. R. 202, together with the judgment of outlawry, and will also return the writ of proclamations. Take the latter writ and return, and file them with the proper officer; and take the exigent and return to the clerk appointed by the master for the purpose of outlawries, see *Reynolds v. Adams*, 3 T. R. 578, and he will thereupon make out the writ of *capias utlagatum*.

At any time before the return of the exigent, however, the defendant may enter an appearance with the clerk of the outlawries, and he will give him a *supersedeas* to the sheriff, who will thereupon cease to proceed to outlawry.

*Capias utlagatum.*] Upon leaving the exigent and return, and judgment of outlawry, with the clerk of the outlawries, he will make out the *capias utlagatum* for you. This writ is either general or special. The general writ is against the person only, the special writ against both the person and property of the defendant. As to the issuing of a *capias utlagatum* after the death of the plaintiff. See *Rees v. Longwell*, 8 Law J. 128, *qb*.

Upon the party being taken on the *capias utlagatum*, the sheriff will discharge him upon an attorney's undertaking to appear for him and reverse the outlawry. 4 & 5 W. & M. c. 18, s. 4. And this undertaking may be given either before or after the return of the writ. *Id.* s. 5. Where a prisoner was discharged under the Insolvent Debtors' Act as to a debt with respect to which a *capias utlagatum* had been sued out, the court refused to allow him to be charged in custody upon the latter writ, although the outlawry had been completed before he had rendered to prison. *Adcock v. Fiske*, 9 Law, J. 17, *cp*. Where the plaintiff caused the defendant to be arrested on an attachment out of Chancery, and then lodged a *capias utlagatum* against him with the sheriff in whose custody he was: the attachment being afterwards set aside for irregularity, and the defendant discharged as to that, the court of common law ordered him to be discharged also as to the *capias utlagatum*. *Hall v. Hawkins*, 4 Mees. & W. 590.

If the defendant be taken upon a special *capias utlagatum*, he is discharged in like manner; but if he be not taken, or if when taken he do not give the undertaking above mentioned,

the sheriff then proceeds to execute the other part of the writ, to enquire by inquisition as to the party's lands and goods within his bailiwick, and to extend and appraise the same; he then seizes them for the crown, and returns the special *capias utlagatum* accordingly. See the form of the inquisition in the Appendix. Get the writ, return and inquisition from the sheriff, and take them to the clerk of the outlawries, who will thereupon make a transcript of them for the court of Exchequer, and then they must be filed with the proper officer. *Reynolds v. Adams*, 3 T. R. 578. The court of Exchequer will then, upon the application of the creditor, award a *renditioni exponas* to sell the outlaw's goods, a *levari facias* to collect the issues and profits of his lands, and a *scire facias* to collect the debts due to him. See *Grant v. Bryant*, 6 M. & S. 347. Out of the produce of these, the creditor may obtain payment of his debt and costs: by motion in the Exchequer, if the amount do not exceed 50*l.*, and the court will thereupon order the sheriff to pay it; see *R. v. Buchanan*, 1 Cr. & M. 195. *Re Manners*, 8 Law, J. 256, ex. 5 *Mees. & W.* 278; or if it exceed 50*l.*, then by petition to the treasury. Where, upon a special *capias utlagatum* against a beneficed clergyman, the sheriff returned that the defendant had no lay fee, but that he was rector of a rectory: the court of Exchequer upon application awarded a writ of sequestration to the bishop. *R. v. Hurd*, 1 *Crompt. & J.* 389, 1 *Tyr.* 347. *S. C. nom. R. v. Hind*, 1 *Dowl.* 286. *S. P. R. v. Armstrong*, 2 *Cr. M. & R.* 205. And see *R. v. Powell*, 1 *Mees. & W.* 321.

## 2. Outlawry upon Final Process.

Upon *non est inventus* being returned to a *ca. sa.* (having fifteen days between the teste and return, 13 C. 2, st. 2, c. 2, s. 6,) you may proceed to outlawry against the party, by suing out a writ of exigent, as directed *ante*, p. 120; a writ of proclamation is not necessary. If the defendant be arrested on the *capias utlagatum*, however, he cannot be discharged upon giving an undertaking, as in the case of outlawry upon *mesne process*, but he must remain in custody until he reverse the outlawry.

It may be necessary to mention, that the court will not allow a party to sue out a *ca. sa.* against a peer or member of parliament, for the purpose of proceeding to outlawry upon it. *Cassidy v. Stewart*, 10 *Law J.* 57, *cp.*

## 3. Reversal of Outlawry.

[Upon motion.] It is entirely in the discretion of the court whether they will reverse an outlawry upon motion, or not.

They will in general do so, for the same errors in fact as would enable the party to reverse it by writ of error, *Beauchamp v. Tomkins*, 3 Taunt. 141. *Hesse v. Wood*, *Id.* 691, if he will submit to such equitable terms as they may impose. If the defendant were beyond seas at the time of the awarding of the exigent, and did not go abroad for the purpose of avoiding the process, the court will reverse the outlawry on motion. *Graham v. Henry*, 1 B. & A. 131. *Levy v. Claggett*, 1 Mees. & W. 547. *Hunter v. Whitfield*, 3 Bing. N. C. 878. *Porter v. O'Meara*, 5 *Id.* 626. But they have refused to reverse it, merely on the ground that he had constantly appeared in public, during the proceedings against him, and there could have been no difficulty in finding him; *Johnson v. Driver*, 1 Dougl. 127; or that the defendant has been discharged as to the debt by the insolvent court. *Dickson v. Baker*, 3 Nev. & M. 775, but see *Nicholson v. Nichols*, 3 Dougl. 326. *Dixon v. Baker*, 2 Dougl. 517. *Adcock v. Fiske*, 9 Law, J. 17, *cp.*, ante, p. 122, *semb. cont.* Nor will they reverse it, upon the motion of any third party, in any collateral proceedings. *Symonds v. Parminter*, 1 W. Bl. 20. Nor will they reverse it even upon the defendant's own motion, unless he will submit to such terms as they impose upon him; *Solly v. Forbes*, 8 Taunt. 516. and see *Summervil v. Watkins*, 14 East, 536; except where it appears that the plaintiff's proceeding to outlawry was, under the circumstances, an abuse of the process of the court, in which case the court will reverse the outlawry without any terms, and even make the plaintiff pay the costs. *Pigou v. Drummond*, 1 Bing. N. C. 354, and see 2 Salk. 495. The usual terms imposed are, in the case of outlawry upon mesne process, payment of costs; *Graham v. Grill*, 1 M. & S. 409, and see *Bank of England v. Reid*, 7 Mees. & W. 159, 10 Law J. 62, *ex.*; in the case of outlawry upon final process, payment of the debt and costs, the costs of the outlawry, &c. See *Ibbotson, et. al. v. Fenton*, 6 Ad. & El. 772.

The motion must be made promptly after the party is first apprized of the proceeding to outlawry; otherwise the court will not relieve him on motion. *Anderson v. Earl Sterling*, 2 Dougl. 267. and see *Lewis v. Davison*, 3 Dougl. 272. And it must appear from the affidavits that it is made at the instance and by the authority of the party outlawed. *Houlditch v. Swinfen*, 2 Bing. N. C. 712, 5 Dougl. 36. *Plunkett v. Buchanan*, 3 B. & C. 736.

[By writ of error.] The party outlawed may proceed to reverse the outlawry by writ of error *coram nobis* or *coram vobis*, either for error appearing on the face of the proceedings, or for error in fact, such as the fact of the party being beyond sea at the time of awarding the exigent. See *Richardson v. Robinson*, 5 Taunt. 309. *Serocold v. Hampsey*, 12 East, 625, *n.*

*Bryant v. Wagstaffe*, 5 B. & C. 314, 8 D. & R. 208. *Hesse v. Wood*, 4 Taunt. 691, or the like.

Bail is required where the want of proclamation is to be assigned for error; in which case the recognizance must be to pay, and not merely to pay or render. 31 *El. c. 3, s. 3*.

This mode of reversing an outlawry, by writ of error, however, is never resorted to in practice, where the party can have relief on motion.

#### SECTION V.

##### *Writ of Capias.*

1. *In what cases a defendant may be holden to bail.*
2. *The affidavit.*
3. *The writ, and how sued out, &c.*

1. *In what cases a defendant may be holden to bail.*

Bystat. 1 & 2 Vict. c. 110, s. 1, "no person shall be arrested upon mesne process in any civil action, in any inferior court whatsoever;—or, (except in the cases and in the manner hereinafter provided for), in any superior court."

The cases and manner in which a defendant may be arrested, above referred to, are thus stated in the act. "If a plaintiff in any action in any of Her Majesty's superior courts of law at Westminster, in which the defendant is now liable to arrest, (whether upon the order of a judge or without such order), shall, by the affidavit of himself or of some other person, show to the satisfaction of a judge of one of the said superior courts, that such plaintiff has a cause of action against the defendant or defendants to the amount of 20*l.* or upwards, or has sustained damage to that amount, and that there is probable cause for believing, that the defendant, or any one or more of the defendants, is or are about to quit England, unless he or they be forthwith apprehended,—it shall be lawful for such judge, by a special order, to direct that such defendant or defendants, so about to quit England, shall be held to bail for such sum as such judge shall think fit, not exceeding the amount of the debt or damages." *Id. s. 3*.

Where this affidavit can be made, therefore, a defendant may now be holden to bail in precisely the same cases as before this act was passed, and in no other. It becomes therefore necessary to consider in what cases a defendant might formerly, and may still, be holden to bail; which shall be done under the following heads.



*In what Actions.*

No person shall be holden to bail, "where the cause of action shall not have originally amounted to the sum of 20*l.* or upwards." 7 & 8 G. 4, c. 71, s. 1. In ordinary cases, therefore, the subject of the intended action must be a debt, or claim in the nature of a debt, to warrant a plaintiff in holding the defendant to bail; for it is only in such a case that it can fairly be predicated that the cause of action amounts to any particular sum. In all other cases, the defendant cannot be holden to bail, unless a judge, upon application, grant an order for that purpose. All this we shall now consider more fully under the following heads.

*Assumpsit.*] It may be taken as a general rule, that in assumpsit, where the promise, express or implied, is to pay money, and the consideration is executed, the defendant may be holden to bail, if the sum be or exceed 20*l.* Therefore a defendant may be holden to bail in an action for goods sold and delivered, money lent, money paid, laid out and expended, money had and received, or in actions on bills of exchange or promissory notes, or the like. Even in the case of a guaranty for the payment of goods sold and delivered to another, the party it seems may be holden to bail, *Cope v. Joseph*, 9 Price, 155, if the affidavit be framed with sufficient certainty. See *Angus v. Robillard*, 2 Dowd. 90, and see *Elworthy v. Maunder*, 5 Bing. 295. But where the consideration is not executed, although the promise be to pay money, the defendant cannot be holden to bail; for instance, he cannot be holden to bail upon an affidavit for goods bargained and sold, unless the affidavit also state that the goods were delivered. *Hopkins v. Vaughan*, 12 East, 398. *Lascar v. Morioseph*, 1 Bing. 357. Or where the promise is not for the payment of money, as, for instance, to manage a farm in a husbandlike manner, to receive and accept goods, &c. or the like, the defendant cannot be holden to bail, unless a judge choose to interfere, and make an order for the purpose. Therefore, in the case of a policy of insurance, which is only a contract of indemnity, and it is impossible to say, without the intervention of a jury, what amount of damages will be sufficient to indemnify the assured, the underwriter cannot be holden to bail, unless indeed there have been an adjustment of the loss. This was holden in a case where the affidavit stated a total loss, and that the defendant had made an unqualified offer to pay 80*l.* per cent. *Lear v. Heath*, 5 Taunt. 201.

For debts arising abroad, a foreigner may hold another to bail in this country, although the law of the foreign country, where the debt was contracted, may not allow of an arrest for

debt. *De la Vega v. Vienna*, 1 B. & Ad. 284. But where a foreigner was arrested in this country, upon a deed executed in France, which, by the laws of France, would have bound his property only, and not his person, the court of Common Pleas held that it could have no greater effect here, and discharged the defendant. *Melo v. Duc de Fitzjames*, 1 B. & P. 138.

Where a defendant had been arrested in an action on the Prothonotary's *allocatur* for costs, the court of Common Pleas, upon application, discharged him; and they expressed great doubt whether such an action would lie. *Fry v. Malcolm*, 4 Taunt. 705.

*Debt.*] In debt on judgment, the defendant may be holden to bail, if he could have been arrested in the original action, and was not. Even where the defendant was arrested in the original action, but was discharged on a common appearance, on the ground of a variance between the declaration and affidavit to hold to bail, the court held that he might again be holden to bail in an action on the judgment. *De la Cour v. Read*, 2 H. Bl. 278. It would have been otherwise, however, if he had been a prisoner in the first action, and were superseded for want of prosecution. *R. H.* 8 G. 2, C. P. 2 Str. 782, 1039. But he cannot be holden to bail in debt on a judgment in trespass, even although the damages exceed the sum for which a party may in ordinary cases be arrested. *Cressey v. Kell*, 1 Wils. 120. Formerly a defendant might be holden to bail on a judgment for debt and costs, although the debt of itself was not of the required amount to warrant an arrest; *Lewis v. Pottle*, 4 T. R. 570. See *Anon. Cowper*, 128 cont.; and in the court of Common Pleas, he might have been holden to bail in debt on judgment for the costs of a nonsuit, *Nightingale v. Nightingale*, 2 W. Bl. 1274, although in the court of King's Bench it was otherwise. *Bush v. Bates*, 5 Burr. 2660. But this is now regulated by stat. 7 & 8 G. 4, c. 71, s. 1, by which it is enacted that no person shall be holden to special bail, "where the cause of action shall not have originally amounted to the sum of 20*l.* or upwards, over and above and exclusive of any costs, charges and expenses that may have been incurred, recovered, or become chargeable in or about the suing for and recovering the same, or any part thereof." It seems that the circumstance of a part of the amount of the judgment being levied under a *fi. fa.*, will not prevent the plaintiff from holding the defendant to bail for the residue, if it be sufficient in amount to warrant an arrest. *Hesse v. Stevenson*, 1 New. Rep. 133. Debt on judgment, however, is now very seldom brought, as by stat. 43 G. 3, c. 46, s. 4, the plaintiff is not entitled to costs in it, unless the court or a judge shall otherwise order.

In debt on bond, conditioned for the payment of money, the defendant may be holden to bail, as of course, for the sum actually due upon it, but not for the penalty. *Kirk v. Strickland*, Doug. 432. *Chambers v. Ward*, 1 Dowl. 139. And where a bond is conditioned for the payment of a sum by instalments, the obligee, on failure of payment of any of the instalments, may hold the obligor to bail for the whole amount. *Talbot v. Hodson*, 7 Taunt. 251. Where a surety, to whom the defendant had given a bond of indemnity, paid several sums on his account, amounting to more than 20*l.*, it was holden that he might hold the defendant to bail for the amount. *Anderson v. Rell*, 2 Tyr. 732. Also a party, having a mortgage and also a bond for the same debt, may hold to bail upon the bond, for the sum due and interest, although a suit be pending in equity for a foreclosure. *Burnell v. Martin*, 2 Doug. 417. But the parties to a bailbond, cannot be holden to bail in an action upon it. *Brander v. Robson*, 6 T. R. 336. *Mellish v. Pitherick*, 8 T. R. 450.

If money be payable by any other species of deed, such as a lease, mortgage, annuity deed, &c. the party indebted may be holden to bail upon it. So in debt on award, for the payment of 20*l.* or upwards, the defendant may be holden to bail, *Coltins, v. Poucell*, 2 T. R. 756, the affidavit stating the money to have been payable "at a certain day now past," *Anon.* 1 Dowl. 5, or shewing otherwise that the time for payment of the money has elapsed. In debt on charter party, also, the party may be holden to bail; and an affidavit in such a case has been holden good, without stating a breach of the charter party. *Skeen v. Mc. Gregor*, 1 Bing. 242.

*Covenant.*] In covenant for the payment of a sum certain, the covenantor may be holden to bail; See *Lambert v. Wray*, 3 Dowl. 169; but not so in any other case.

*Detinue, Trespass, Case, Trover.*] Formerly, no person could be holden to bail in trover or detinue, without an order made for that purpose by the chief justice or other judge of the court; *R. H.* 48, *G.* 3, *K. B.*; *R. H.* 48, *G.* 3, *C. P.*; and the same in the Exchequer. *Dax. Pr.* 50. In trespass, also, a judge at chambers might make such an order upon an affidavit of the facts; and it frequently occurred, in cases of very aggravated assaults, of very aggravated trespasses to property, real or personal, particularly where the defendant was about to leave the country. So, in trespass for mesne profits, if a proper case were made out for a judge's interference in this respect, he would grant an order. So, in actions on the case in tort, a judge, upon application, in very gross or serious cases, would make an order. But where a tenant fraudulently removed his goods,

to prevent a distress, Taunton, J., refused an order to hold him to bail in an action for double value of the goods, saying there was no instance of an order being granted in such a case. *Sutton v. Oswald*, 1 Dowl. 348. The application for such an order, was, of course, ex parte; and as the judge, on that account, expected to be fully satisfied that the plaintiff had a good cause of action, the affidavit must have shewn all the facts necessary to support it. *Driver v. Hood*, 7 B. & C. 494. Great care was required to be taken in this respect; for even if the judge made the order, the affidavit might afterwards be brought under the consideration of the court, upon a motion to discharge the defendant out of custody. Where the affidavit was, that the defendant was indebted to the plaintiff in a certain sum "in trover," without stating more, the court ordered the bail bond to be cancelled. *Hubbard v. Pacehco*, 1 H. Bl. 219. So, in trover for a bill of exchange, the affidavit was holden bad, because it did not allege that the bill remained unpaid, for without this it did not appear that the bill was of any value. *Clarke v. Cawthorne*, 7 T. R. 321. So, where the affidavit stated, that the plaintiff's cause of action against the defendant was, for converting and disposing of divers goods and chattels, of the value of 250*l.*, which he refused to deliver up, though the plaintiff demanded the same: this was holden bad, as not stating positively any cause of action; the defendant was stated to have refused to deliver up the goods, but it was not stated that he had ever taken them. *Woolley v. Thomas*, 7 T. R. 550. In another case, however, which was an action of trover against a custom-house officer, an affidavit, stating the defendant to be indebted to the plaintiff in 103*l.*, for goods of the plaintiff which the defendant had converted to his own use, was holden sufficient. *Emmerson v. Hawkins*, 1 Wils. 335. So, an affidavit in trover, that the deponents had possessed themselves of certain goods of plaintiff, and refused to deliver them up, and that they or some of them had converted them, was holden good; because the possession and refusal by all, was a conversion by all, and the latter words were surplusage. *Charter v. Jacques*, Coup. 529. So, an affidavit stating circumstances, shewing that the plaintiff was damnified to a certain amount, was holden sufficient, although it improperly stated the defendant to be indebted to that amount. *Imlay v. Ellefsen*, 2 East, 453. Swearing as to belief, has in some cases of this kind been permitted, *Allen v. Barry*, 1 Chit. 168, particularly with respect to the amount of damage alleged to have been done. *Hodgson v. Dowell*, 3 M. & W. 284. But where in trover by assignees of a bankrupt, the conversion was sworn to merely "as appears by the books of the bankrupt, and by the letters of S. (the agent), and letters of the plaintiffs, as this deponent believes:" the court held that the affidavit in this respect was not suffi-

ciently certain to shew a conversion; and they discharged the defendant on common bail. *Melling v. Buckholts*, 2 M. & S. 563.

And in all actions on the case, trover, detinue or trespass, where the defendant might have been holden to bail, by order of a judge, as above mentioned, a judge will make a like order still, if the necessary affidavit can be made, shewing his intention to quit England.

*Actions by persons in autre droit.*] Executors and administrators, assignees of bankrupt, and others suing *in autre droit*, may hold to bail, in precisely the same cases as the persons, whom they represent, might have done. The only distinction is, in the form of the affidavit, which shall be noticed hereafter.

*For what amount of debt.*

By stat. 7 & 8 G. 4, c. 71, s. 1, no person shall be holden to special bail, "where the cause of action shall not have originally amounted to the sum of £20 or upwards, over and above and exclusive of any costs, charges and expenses, that may have been incurred, recovered or become chargeable in or about the suing for or recovering the same or any part thereof."

As to defendants residing in Wales, and the counties palatine, formerly they could not be arrested upon any mesne process issuing out of any of the courts at Westminster, unless the process were duly marked and indorsed for bail in a sum not less than £50. 7 & 8 G. 4, c. 71, s. 7. But this section is holden to have been virtually repealed by stat. 1 & 2 Vict., c. 110; and a judge may now order a defendant to be holden to bail in the counties palatine, in a sum under £50, in precisely the same manner as in other counties. *Brown v. Mc. Millan*, 7 Mees. & W. 196, 10 Law J. 147 *ex.*

Where the parties have cross demands upon each other, the plaintiff should arrest for the balance only; and if that be not of a sufficient amount, he should not apply for a capias. Where a plaintiff in such a case, instead of giving credit for the amount he owed his debtor, held him to bail for the full amount of the debtor side of the account, and recovered the balance only: the court, upon application by the defendant, deprived the plaintiff of his costs, under stat. 43 G. 3. c. 46, s. 3. *Dronefield v. Archer*, 5 B. & A. 537. And in another case, where the plaintiff arrested the defendant for £23, when he knew that upon the balance of accounts only £5 was due to him, and the defendant brought an action against him for it; the court held that the arrest was malicious and without probable cause, and that the party was en-

titled to recover. *Austin v. Debnam*, 3 B. & C. 139. But where two tradesmen agreed to deal with each other by way of barter, and afterwards one of them, when applied to, refused to give any statement of his account, it was holden that the other was warranted in arresting him for the whole value of the goods he had furnished. *Germain v. Burrows*, 5 Taunt. 259. Where the acceptor of a bill of exchange for £25, finding that the holder was about to proceed against him upon it, offered by letter to pay him £10 on account, and afterwards paid that sum to his wife; notwithstanding this, however, the acceptor was afterwards arrested for the £25: upon application to discharge him out of custody, it was argued for the plaintiff, that having another demand against the acceptor, and there being no specific appropriation of the £10 to the bill, at the time it was paid, he had appropriated it to the other demand, so that the £25 was still due upon the bill; but the court held that the previous letter was an appropriation, and that as £15 only remained due, the plaintiff had no right to have the defendant arrested; he was therefore ordered to be discharged. *Short v. Cunningham*, 1 Dowd. 662. But where an attorney arrested his client for the amount of his bill, and afterwards the bill was reduced upon taxation below the amount for which the client could have been holden to bail: the court refused to order the bail bond to be cancelled. *Thwaites v. Piper*, 4 D. & R. 194. Where the defendant was indebted to the plaintiff in a sum for which he could not be arrested, and the plaintiff procured the holder of a promissory note of the defendant to indorse it to him, and then held the defendant to bail for both debts jointly: the court, deeming this an artifice for the purpose of evading the statute, discharged the defendant upon common bail. *Wigglsworth v. Isherwood*, 1 Ld. Ken. 371.

Where the payment of money is secured by a penalty, the party shall not be holden to bail for the penalty, but merely for the amount of the sum secured by it. *Hatfield v. Lin-guard*, 6 T. R. 217. *Kirk v. Strickland*, 2 Doug. 449. So, if a tenant be bound in a penalty of £100, to do certain repairs within a limited time: the court will not allow him to be holden to bail for the £100, upon an affidavit which does not shew in what respect and to what amount he has violated his contract. *Edwards v. Williams*, 5 Taunt. 247. If, indeed, the amount sought to be recovered be liquidated damages for the breach of a contract, &c. the defendant may be holden to bail for it. *Per Ld. Ellenborough, C. J., Wildey v. Thornton*, 2 East, 400. But the affidavit in such a case, must shew very fully that they are liquidated damages, and not a mere penalty, *Id.*, and must also shew a breach of the contract. *Stinton v. Hughes*, 6 T. R. 13. And the merely calling them liquidated damages in the contract, will not make them so. Therefore

where the affidavit stated the defendant to be indebted to the plaintiff in the sum of £20, on articles of agreement, whereby he bound himself in that sum "to be recovered as liquidated damages," and that he had broken the same, by neglecting to make certain weekly payments: Taunton, J. said, that what the plaintiff had thought fit here to call liquidated damages, were not so in point of law, and their being called so in the instrument, did not make them so; that the plaintiff in this case had no right to hold to bail for the £20, unless he had shewn by his affidavit that the weekly payments in arrear amounted to that sum; he therefore ordered the defendant to be discharged. *Chambers v. Ward*, 1 Dowl. 139.

*Who may be holden to bail.*

All persons may be holden to bail, unless they enjoy some particular exemption from arrest under civil process; and which exemptions we shall now consider under the following heads:—

*The royal family and their domestics.*] The queen, and all the other members of the royal family, are exempt from arrest for debt. So, the queen's servants in ordinary with fee, are privileged from arrest upon mesne process. See *T. Raym.* 152. *R. v. Moulton*, 2 Keb. 3. The lords of the bed-chamber, *Aldridge v. Barry*, 3 Dowl. 450, the queen's chaplains, *Byrn v. Dibdin*, 3 Dowl. 448, yeoman of the queen's privy chamber, *semb. see Luntley v. Battine*, 2 B. & A. 235, are thus privileged, being servants in ordinary with fee. So is a clerk of the kitchen, *Bartlett v. Hebbes*, 5 T. R. 686, a lighter of fires and candles to the queen's yeoman of the guard, *Forster v. Hopkins*, 2 Chit. 46, and all other menial servants of the queen's household, See *Tapler v. Battine*, 1 D. & R. 79. *R. v. Frampton*, 2 Keb. 485, although they publicly carry on trade. and the debt have been contracted in the course of that trade. *King v. Foster*, 2 Taunt. 167. But the Somerset herald, not being a servant in ordinary with fee, has been holden not to be entitled to the privilege. *Leslie v. Disney*, 3 Dowl. 437. So, gentlemen of the queen's privy chamber, *Tapler v. Battine*, 1 D. & R. 79, and the deputy governor, wardens and mayor of the tower, *Batson v. M'Lean*, 2 Chit. 48, 51. *R. v. Frampton*, 2 Keb. 485. *Bidgood v. Davies*, 6 B. & C. 84, not being menial servants, are not entitled to the privilege. If the right to the privilege be clear, the court upon application will discharge the party out of custody, or order the bail bond to be delivered up to be cancelled; *Bartlett v. Hebbes*, 5 T. R. 686; but if it be doubtful, the court usually refuse to interfere, leaving the party to his remedy by writ of privilege. *Luntley*

*v. Battine*, 2 B. & A. 234. So, where a person, claiming to be one of the king's servants, being sued in the Marshalsea court, claimed his privilege there, and was refused; he then removed the proceedings into the court of King's Bench by habeas, put in and perfected bail, allowed judgment to go by default, and a writ of inquiry to be executed; and he then moved to have an *exoneretur* entered on the bail piece, on the ground of his privilege: but the court held, that as he had removed the cause, knowing that special bail was necessary in order to perfect the removal, he had no right first to treat the bail as valid, to get one benefit, and then as invalid to get another; and they therefore refused to relieve him. *Sard v. Forrest*, 1 B. & C. 139.

*Peers.*] English peers and peeresses, are in like manner privileged from arrest. So are Irish peers, *Coates v. Ld. Harwarden*, 7 B. & C. 388, and Scotch peers, *Digby v. Earl of Stirling*, 8 Bing. 55, who have been allowed to vote at the election of representative peers.

*Members of parliament.*] Formerly members of parliament could not even be sued during their time of privilege. But that right was given up, by stat. 10 G. 3, c. 50, reserving merely the privilege from arrest. See also 12 & 13 W. 3, c. 3, s. 2, and 11 G. 2, c. 24, s. 2. And this privilege continues for a reasonable time after a dissolution of parliament; *Barbardo v. Mordaunt*, 1 Ld. Ken. 125; and if a member be arrested within that time, the court will discharge him, without requiring him to enter any appearance. *Holiday v. Pitt*, 2 Str. 985. So, where a defendant, who was holden to bail, was afterwards elected a member of the house of commons, the court, upon application, ordered an *exoneretur* to be entered on the bail piece. *Phillips v. Wellesley*, 1 Dougl. 9.

*Ambassadors and their servants.*] Ambassadors cannot be arrested upon civil process; nor can their "domestics or domestic servants" (not being traders within the meaning of the bankrupt laws) be arrested; all writs against their persons or property being declared void by stat. 7 Ann. c. 12, s. 3, and a punishment assigned to those who shall presume to sue them out or execute them. *Id.* s. 5. This does not extend to consuls. *Viveash v. Becker*, 3 M. & S. 284. And where an ambassador's servant is arrested, and an application is made to discharge him, the affidavit must be such as to satisfy the court, that he is a domestic servant of the ambassador, not collusively appointed for the purpose of the privilege, *Lockwood v. Coysgarne*, 3 Burr. 1676. *Toms v. Hammond*, *Barnes*, 370. *Masters v. Manby*, 1 Burr. 401. *Darling v. Atkins*, 3 Wils.



33, but *bonâ fide* appointed, and acting as such domestic; and for this purpose he must shew the nature of his office or service, the duties he is required to perform, and that he is in the habit of executing them. *Wigmore v. Alvarez*, *Fitzg.* 200. *Ball v. Fitzgerald*, *Barnard.* 401. *Triquet v. Bath*, 3 *Burr.* 1478. It is not necessary that he should be actually a menial servant, *Wigmore v. Alvarez*, *Fitzg.* 200, but he must be *bonâ fide* a domestic. See *Novello v. Toogood*, 2 *D. & R.* 833. *Fisher v. Begrez*, 1 *Cr. & M.* 117, 2 *Id.* 240. The ambassador's secretary, is also within the act. *Hopkins v. De Robeck*, 3 *T. R.* 79.

*Attorney.*] An attorney cannot be holden to bail, in an action in the court of which he is an attorney, *Wheeler's case*, 1 *Wils.* 298, even although the plaintiff be also an attorney of the court, *Barber v. Palmer*, 6 *T. R.* 524. *Lewis v. Ascough*, *Barnes*, 35. *Unwin v. Robinson*, *Barnes*, 53, or the defendant be sued jointly with another person. *Ramsbottom v. Harcourt*, 4 *M. & S.* 585. *Kepp v. Biggs*, 2 *Dowl.* 278. *Branthwaite v. Blackerly*, 2 *Salk.* 544. *Robarts v. Mason*, 1 *Taunt.* 254. If he be arrested, the court, upon application within a reasonable time, *Bernard v. Winnington*, 1 *Chit.* 188, will order him to be discharged. *Wheeler's case*, 1 *Wils.* 298. So, an attorney cannot be holden to bail, in an action in a court of which he is not an attorney, *Snee v. Humphreys*, 1 *Wils.* 306, even although the plaintiff be an attorney of that court. *Pearson v. Henson*, 4 *D. & R.* 73. See *Launder v. Cochayne*, *Barnes*, 35, & *Walker v. Rushbury*, 9 *Price*, 16, *contra*. If he be arrested, however, neither the court in which he is sued, *Snee v. Humphreys*, 1 *Wils.* 306. *Mayor of Basingstoke v. Bower*, 2 *Str.* 864, nor the court of which he is an attorney, *Amon.* 1 *Dowl.* 3, will interfere; but his only remedy is, to sue out a writ of privilege, and plead to the jurisdiction,—in the mean time putting in and perfecting bail, or remaining in custody, as in ordinary cases.

An attorney, however, who has left off practice, is not entitled to this privilege. Even where aailable writ against an attorney, sued out at a time when the attorney was out of practice, was executed after he had recommenced practice and had his certificate, the court held that he was not entitled to his privilege. *Brooke v. Bryant*, 7 *T. R.* 25. So an attorney, who has not taken out his certificate for a year or longer time, is not entitled to his privilege, for he is no longer on the roll of attorneys; *Dyson v. Birch*, 1 *B. & P.* 4; but otherwise, if he be arrested before the expiration of the year. *Skirrow v. Tagg*, 5 *M. & S.* 281. So, an attorney, who is in prison for debt, is not entitled to his privilege. *Byles v. Wilton*, 4 *B. & A.* 88.

*Bankrupt or insolvent.*] A bankrupt, before he obtains his certificate, may be holden to bail for any debt not actually proved under the commission. But if the creditor afterwards wish to prove upon the estate, he must relinquish his action, and give the bankrupt a written discharge, before his proof can be received. 6 G. 4, c. 16, s. 59. Or if, having proved, he afterwards commence an action against the bankrupt, and hold him to bail, in that case, although a court of law would not discharge the defendant, see *Oliver v. Ames*, 8 T. R. 364. *Hill v. Reeves*, 1 B. & P. 424, yet the Court of Review would. See *Harley v. Greenwood*, 5 B. & A. 95. After a bankrupt has obtained his certificate, however, he cannot be holden to bail for any debt which was proveable under the commission, 6 G. 4, c. 16, s. 121, even although he may have renewed the debt, after his bankruptcy, by a promise in writing; *Peers v. Gadderer*, 1 B. & C. 116. *Bailey v. Dillon*, 2 Burr. 736. See *Blackbourn v. Ogle*, 8 Price, 526, *cont.*; unless, indeed, the commission or fiat appear to have been grossly fraudulent. *Swaby v. Jones*, 2 W. Bl. 725. See *Kemp v. Neville*, 5 Moore, 21. But the court will not interfere in favour of a defendant, who has been arrested in this country for a debt contracted abroad, merely on the ground of his having been discharged from the debt by a bankruptcy in his own country; particularly if the plaintiff at the time of the arrest reside in this country. *Podder v. M'Master*, 8 T. R. 609. *Earlier v. Languishe*, 2 Chit. 55.

So, a person who had been discharged under the insolvent act cannot afterwards be holden to bail for any debt contained in his schedule, 7 G. 4, c. 57, s. 60. *Norton v. Moseley*, 6 B. & C. 106, even although he may have renewed the debt, after his discharge, by a promise in writing. *Wilson v. Kemp*, 3 M. & S. 595. *Butt v. Vine*, 4 D. & R. 154. *Collins v. Lightfoot*, 5 B. & C. 581. *Taylor v. Higgins*, 3 East, 169. See *Horton v. Meggidge*, 6 Taunt. 563, *cont.* But where an insolvent, upon the hearing of his petition, was adjudged to remain in custody at the suit of his opposing creditor (who was not a detaining creditor) for nine months, and the marshal discharged him before the nine months had expired: the court held that he might afterwards be arrested and holden to bail by such opposing creditor, for the same debt. *Edwards v. Tucker*, 4 D. & R. 216. And whilst he remains in custody, the court in such a case will at any time, at the instance of the opposing creditor (if the prisoner be not in execution at his suit), award a capias against him, under the 85th sect. of stat. 2 & 3 Vict. c. 110, without the usual affidavit. *Growcock, et al. v. Waller*, 11 Ad. & El. 165. But if the defendant be in custody of the marshal or warden, they have no power to make the capias operate as a detainer, for they cannot direct

the capias to either of them, but merely to the sheriff. *Edwards v. Robertson*, 5 Mees. & W. 520, 9 Law J. 3 ex.

*Executor, &c.*] There is an old rule in the Court of Queen's Bench, that an executor, administrator, or heir, shall not be holden to bail; *R. M.* 15, c. 2: and such is the practice, not only of that court, but also of the courts of Common Pleas and Exchequer. An executor or administrator, however, may be holden to bail, in an action on a judgment suggesting a devastavit.

*Feme covert.*] A married woman, sued alone, as a feme sole, should not be arrested; for she may plead her coverture, and the plaintiff cannot recover against her. If, however, she be arrested, the court will discharge her on filing a common appearance, *Samwell v. Jenkins*, 6 Moore, 500, even although she live apart from her husband, *Pritchett v. Cross*, 2 H. Bl. 17. *Hookham v. Chambers*, Brod. & B. 92, or although her husband have absconded, and the debt were incurred by her whilst a feme sole, *Crookes v. Fry*, 1 B. & A. 165, unless there be a doubt as to her marriage, or she have committed some fraud in the contraction of the debt. *Partridge v. Clarke*, 5 T. R. 194. *Waters v. Smith*, 6 T. R. 451. *Luden v. Justice*, 1 Bing. 344. *Freame v. Mitford*, 1 Cr. & M. 54. Even where she contracted the debt as a feme sole, and passed as such, but she really believed her husband was dead, and told the plaintiff the grounds of her belief, at the time he gave her the credit: the court discharged her. *Pitt v. Thompson*, 1 East, 16. Nor is it any ground for opposing the discharge of a married woman, that the plaintiff trusted her as a feme sole, not knowing she was married, and that the general reputation in the neighbourhood was that she was a feme sole, provided she did not represent herself as such. *Collins v. Rowell*, 1 New. Rep. 54. *Hilden v. Sandon*, *Id. cit.* And the mere fact of her living apart from her husband, with a separate maintenance, will not warrant the plaintiff in holding her to bail as a feme sole. *Wardall v. Gooch*, 7 East, 582. But where the defendant was a foreigner, and her husband had been abroad three years, but not separated from her, the court refused to discharge her, although she had not represented herself as a feme sole, and she swore she believed that the defendant knew she was married. *Burfield v. De Pienne*, 2 New Rep. 380, and see *De Gaillon v. L'Aigle*, 1 B. & P. 8. The Court of Common Pleas require the affidavit of coverture to be made by the woman herself; they have refused to discharge a married woman, upon an affidavit by a third person that she was married. *Jones v. Lewis*, 7 Taunt. 55. And the affidavit must be positive; it is not sufficient to swear to the marriage, "as by the

certificate hereunto annexed will appear," or the like. *Harvey v. Cooke*, 5 B. & A. 747. If it appear that the plaintiff arrested the defendant, knowing her to be a married woman, the court, upon discharging her, usually order him to pay the costs. *Wilson v. Serres*, 3 Taunt. 307.

Also, where the action is against husband and wife, and she alone is arrested, the court, upon application, will discharge her. *Edwards v. Rourke*, 1 T. R. 486. So, where both are arrested, the court, upon application, will discharge the wife, even although it be for a debt contracted by her *dum sola*. *Taylor v. Whittaker*, 2 D. & R. 225. And where the husband and wife were rendered in discharge of their bail, the court discharged the wife upon motion. *Anon.* 3 Wils. 124.

*Infant.*] An infant may be holden to bail, even upon a promissory note or bill of exchange, or for any other cause of action in which infancy would be a good defence; the court will not discharge him. *Madox v. Eden*, 1 B. & P. 480.

*Lunatic.*] The court will not discharge a defendant, upon entering a common appearance, merely on the ground that he was a lunatic at the time of the arrest, *Nutt v. Verney*, 4 T. R. 121, or has since become so. *Kernot v. Norman*, 2 T. R. 390. *Ibbotson v. Ld. Galway*, 6 T. R. 133.

*Soldiers and Seamen.*] The several acts of parliament which prohibit the arrest, upon mesne process, of soldiers, marines, and seamen in the Queen's service, for debts under 20*l.*, are no longer of any effect, that being the law now with respect to all persons. For debts above 20*l.*, contracted by such seamen or marines before they entered the service, the affidavit must be in the form, &c. prescribed by stat. 1 G. 2, st. 2, c. 14, s. 15: and the like as to soldiers, by the annual mutiny acts.

*In second action for the same cause.*] If after arresting a defendant upon mesne process, the plaintiff hold him to bail a second time for the same debt, and the second arrest appear to be vexatious, the court, upon application, will order the defendant to be discharged, or the bail bond to be delivered up to be cancelled. Where the arrest is in the second action only, it is obviously not within the above rule, and the court in such a case will not relieve the defendant, even although the first action have not been discontinued, *Bishop v. Powell*, 6 T. R. 616. *Chapman v. Vandevelde*, 3 Dougl. 313, *Anon.* 1 Dougl. 59. *Brickline v. Smalkwood*, 3 Dougl. 569, or although the second action be upon a judgment obtained in the first, *Hesse v. Stevenson*, 1 New Rep. 133, and although a writ of error be pending on such

judgment, and bail in error put in and perfected. *Kindal v. Carey*, 2 *W. Bl.* 786. So, where a writ of *Ne exeat regno* was obtained against a person, with relation to a debt alleged to be due from him, to which he gave bail; and the creditor afterwards held him to bail for the debt: the court refused to discharge him, holding that this could not be deemed a second arrest for the same cause of action. *Musgrave v. Medex*, 8 *Taunt.* 24. So, where the first arrest has been in a foreign country, the defendant may again be holden to bail here, for the same cause of action, *Maule v. Murray*, 7 *T. R.* 470, or on the foreign judgment; *Aliven v. Furnival*, 1 *Dowl.* 614; but if the first suit were in one of the superior courts in Ireland, the courts here will not allow the defendant to be holden to bail in an action on the judgment. *Gunn v. M'Clintock*, 2 *Dowl.* 660. So, if the first arrest or similar proceeding be in an inferior court, as, for instance, if a defendant surrender or put in bail upon a foreign attachment in London, he may afterwards be holden to bail for the same cause of action, in one of the courts at Westminster, *Wood v. Thompson*, 5 *Taunt.* 851. *Bromley v. Peck*, 5 *Taunt.* 852, except in cases where such a proceeding would evidently be vexatious. See *England v. Lewis*, 3 *D. & R.* 189. Or, if in the first action the bail be discharged, or the proceedings become unavailable, without any fault of the plaintiff, he may in general hold the defendant a second time to bail for the same cause. Therefore, where the judgment in the first action was reversed for error, it was holden that the plaintiff might again hold the defendant to bail in a new action for the same debt. *Cartwright v. Keeley*, 7 *Taunt.* 192. So where, in debt on bond, the plaintiff was nonsuit, for not proving the execution of the bond; and the plaintiff then held the defendant to bail in a second action upon the same bond: the court refused to discharge him, his affidavit not denying the execution. *Harris v. Roberts, Barnes*, 69. And the same where the nonsuit was for a variance. *Kearney v. King*, 1 *Chit.* 273. But if a plaintiff be nonsuit upon the merits, he will not be allowed to hold the defendant to bail in a second action for the same cause. *Anon.* 1 *Tidd.* 175. Where one of two partners was sued in a bailable action, and pleaded the non-joinder in abatement, upon which the plaintiff entered a *cassetur breve*: it was holden that the plaintiff might afterwards hold both partners to bail for the same cause of action. *Salisbury v. Whiteall*, 1 *Tidd.* 175. So where the defendant gave a bond, conditioned for the payment of a certain sum, if the sentence of a vice admiralty court should be affirmed on appeal; and the appeal being dismissed, the obligee held the defendant to bail in an action on the bond; the appeal, however, being afterwards restored upon petition, the plaintiff's proceedings on the bond were suspended, and the bail obtained an exoneretur on the bail-

piece; after some years the appeal was again dismissed, and the plaintiff again held the defendant to bail in a new action on the bond: and the court held that he might do so, the proceeding in the first action being suspended, and the bail discharged, without any fault whatever of the plaintiff. *Woodmeston v. Scott*, 1 *New Rep.* 13. So, where the defendant in the first action was discharged, on the ground of a variance between the declaration and the affidavit to hold to bail, it was holden that he might again be holden to bail in an action on the judgment. *De la Cour v. Read*, 2 *H. Bl.* 278. So where the defendant was let out of custody, at his own request, that he might attend to some particular business, it was holden that he might be again arrested upon the same affidavit; *Pensfold v. Maxwell*, 1 *Chit.* 275 n; and the same, where the defendant was let out of custody upon his promise to give certain securities, which he never afterwards gave. *Cantellow v. Freeman*, 1 *Cr. & M.* 536. So if the defendant be discharged in the first action, upon giving bills or other securities, which afterwards become unavailable, he may again be holden to bail, either on the bills, &c. *Hamber v. Cooper*, 2 *Cr. M. & R.* 148, 1 *Gale*, 103, or perhaps for the original cause of action, if the securities become unavailable through his own default or fraud, *Puckford v. Maxwell*, 6 *T. R.* 52, but not otherwise. *Wilson v. Hamer*, 8 *Bing.* 54. *McClure v. Pringle*, 13 *Price*, 8. *Daniel v. Dodd*, 8 *East*, 334. So, where the defendant was discharged in the first action, on the ground that the warrant on the writ had been altered, this having occurred without the plaintiff's knowledge, it was holden that he might again arrest the defendant for the same cause. *Housin v. Barrow*, 6 *T. R.* 218. And if a defendant be arrested at a time when he is privileged from an arrest, and be discharged on that ground, he may be again arrested, even on the same capias. *Barrack v. Newton*, 10 *Law, J.* 182, *qb.* So, if a defendant be holden to bail, and the cause be referred before verdict, he may again be holden to bail in an action on the award, the first bail being discharged by the reference. *Collins v. Powell*, 2 *T. R.* 756. But if in the first action, the defendant be discharged, or the bail exonerated, or the proceedings rendered unavailable, from the default or laches of the plaintiff, he will not be allowed to hold the defendant to bail a second time, either in an action on the judgment, or in a second action for the same cause. For instance, if the defendant be superseded in the first action, by reason of the plaintiff not proceeding against him in due time, he will not be allowed to hold the defendant to bail, either in a second action for the same cause, *Imlay v. Ellison*, 3 *East*, 309, or in an action upon the judgment in the former suit, *Blandford v. Foote*, *Coup.* 72, even although the supersedeas were in an inferior court. *England v. Lewis*, 3 *D. & R.* 189. And where the

plaintiff, after holding the defendant to bail, and proceeding to verdict against him, took from him three bills as a collateral security; and the defendant being afterwards rendered by his bail, and being superseded on account of the plaintiff's not charging him in execution, was again arrested at the suit of the plaintiff upon the bills; the court, upon application, discharged him. *Daniel v. Dodd*, 8 *East*, 334. So after a *non pros* in the first action, if the plaintiff again cause the defendant to be arrested for the same cause of action, the latter shall be discharged, unless the plaintiff shew that the non pros arose from some mistake or the like, and that the second arrest was not for the purpose of vexing or harassing the defendant. *Archer v. Champneys*, 1 *Brod. & B.* 289. *Williams v. Thacker*, *Id.* 514. See *Turton v. Hayes*, 1 *Str.* 439. *semb. cont.* Where a plaintiff discontinues the first action, for any cause that might render the further proceedings in it nugatory or bad, as for instance, where he had adopted a wrong form of action, *Bates v. Barry*, 2 *Wils.* 381, or brought the action in a wrong court, *Paine v. Gaudery*, 3 *D. & R.* 33, or the like, he may again hold the defendant to bail for the same cause, after the discontinuance of the first action is perfected by the costs being taxed and paid. *Belifont v. Levy*, 2 *Str.* 1209. *Molling v. Buckholtz*, 3 *M. & S.* 153; and see *Price v. Day*, 1 *Cr. M. & R.* 937. But where a detainer was lodged against a prisoner, already in custody in execution in another suit, but the detainer being for too small a sum, the plaintiff obtained the usual rule to discontinue on payment of costs, and before the costs were paid, lodged another detainer for the correct sum against the defendant: this was objected to, as the costs had not been paid; but the court held it regular, saying that this was not like the case of a fresh arrest, which cannot be made until after the costs have been paid. *White v. Gompertz*, 5 *B. & A.* 905. See *S. C.* 1 *D. & R.* 556, *cont.* Where a plaintiff, however, discontinued his first action, because it was commenced before the time of credit had expired, and afterwards commenced a fresh action for the same cause, and again held the defendant to bail: the court held that he had no right to do so, and discharged the defendant. *Wheelwright v. Joseph*, 5 *M. & S.* 93. And the same in all cases, where the first arrest was improper, or the second vexatious. Where the plaintiff arrested the defendant for two items, and recovered for one of them only, offering no evidence on the other, and then held the defendant again to bail for the other, the court discharged him. *Hamilton v. Pitt*, 7 *Bing.* 230.

Executors may hold a party to bail, for a debt due to their testator, although the testator in his lifetime had holden the defendant to bail for the same debt; *Mellin v. Evans*, 1 *Crompt. & J.* 82; that is, supposing the first action to have abated. So, the assignees of a bankrupt may hold a party to bail for a

debt due to the bankrupt's estate, although the bankrupt, before his bankruptcy, had holden the defendant to bail for the same cause. *Barnes v. Maton*, 1 *Tidd*. 175. But where a bailable action was brought by assignees in the name of the bankrupt, and the defendant arrested, it was holden that the defendant could not afterwards be holden to bail at the suit of the assignees, for the same cause of action, until the first action had been discontinued and the costs paid. *Carter v. Hart*, 1 *Chit*. 276.

By R. G. H. 2 W. 4, s. 7, "after non pros, nonsuit, or discontinuance, the defendant shall not be arrested a second time, without the order of a judge." The only alteration this rule makes in the practice, is, that in the particular cases mentioned in it, a judge's order must be obtained, before the defendant is holden to bail in the second action; the judge, in considering whether an order shall be granted, will still be guided by the former decisions upon the subject. The rule also is strictly confined to the cases of non pros, nonsuit, and discontinuance; *Cantellow v. Freeman*, 1 *Cr. & M.* 536; and in cases within it, it is not necessary to indorse on the writ that it is sued out by leave of a judge; *Richards v. Stuart*, 2 *Dowl.* 754; and the irregularity of suing it out without leave, will be waived by the defendant's attorney undertaking to put in bail. *Holliday v. Lawes*, 3 *Bing. N. C.* 541.

## 2. The Affidavit.

*Title.*] If the writ of summons have been sued out, at the time the affidavit is sworn, then as there is a cause in court, this affidavit must of course be intituled in the court and cause. But if the affidavit happen to be made before the suing out of the writ of summons, it need not be intituled. *Schletter v. Cohen*, 7 *Mees. & W.* 389, 10 *Law, J.* 99, *ex.*

*Deponent's addition.*] The affidavit must state the addition of the party making it: *R. G. H.* 2 W. 4, s. 5,; otherwise the defendant may be discharged, upon entering a common appearance. *Jarret v. Dillon*, 1 *East*, 18. "Manufacturer," *Smith v. Younger*, 3 *B. & P.* 550, and "Merchant," *Vaisser v. Alderson*, 3 *M. & S.* 166, have been deemed good additions of degree or mystery; "of Bath, in the county of Somerset," *Coppin v. Potter*, 2 *Dowl.* 785, "of the city of London," *Vaisser v. Alderson*, 3 *M. & S.* 166, have been deemed good additions of place. But in prudence it may be advisable to state the addition both of degree and place, with more certainty than in the instances now mentioned. It is not sufficient to say "late of" such a place, but the present abode of the party must be stated. *Sedley v. White*, 11 *East*, 528.



Where, however, the affidavit was "late of Tyrone, in the county of Tyrone, in Ireland, but now in Dublin Castle," it was holden sufficient. *Stuart v. Geveran*, 1 Har. & W. 699. Where a foreigner, resident abroad, and who came to this country merely for the purpose of making the affidavit, was described as of his place of residence in the foreign country, and not of the place where the affidavit was made: the court held this to be sufficient. *Bouhett v. Kittoe*, 3 East, 154. And where a clerk described himself as clerk to A. B. & C. D., of, &c. (stating their place of business), this was holden to be sufficient; *Alexander v. Milton*, 1 Dowl. 570, 2 Tyr. 495. *Haslope v. Thorne*, 1 M. & S. 103; but merely describing himself as "acting" as clerk to them, would not. *Graves v. Brown- ing*, 6 Ad. & El. 805. The addition of place given, must be the true place of residence or of business of the deponent; if it be mis-described, the court, upon application, will discharge the defendant or order the bail bond to be delivered up to be cancelled. *Collins v. Goodyer*, 2 B. & C. 563. See further upon this subject, post, tit. "Affidavit."

*Names of parties.*] Before the making of the statute and rule of court, which shall be mentioned presently, if an affidavit to hold to bail described the defendant by his surname and the initial merely of his christian name, it would be bad, and the defendant would be discharged out of custody, or the bail bond ordered to be delivered up to be cancelled; *Reynolds v. Hankin*, 4 B. & A. 536. *Lake v. Silk*, 3 Bing. 296; even although the action were brought on a written instrument, signed with the initial of his christian name, and the defendant had signed the bail bond in the same manner. *Parker v. Bent*, 2 D. & R. 73. *M'Beath v. Chatterly*, 2 D. & R. 237. *Taylor v. Rutherman*, 5 Moore, 264. So, if the christian name was mistaken, as "James Thomas" for John Thomas, *Coles v. Gum*, 1 Bing. 424, "Josiah" for Josias, *Johnson v. Cooper*, 5 Moore, 472, the court would discharge the defendant, or order the bail bond to be cancelled, even although the defendant signed the bail bond with an initial corresponding with both names. And the same as to the surname, *semb.* See *Finch v. Cochen*, 1 Gale, 130. Where the affidavit was made by a clerk, who described himself as clerk to Lewis Joseph John Noel, and swore that the defendant was "justly and truly indebted unto the said John Noel: the court held it sufficient, the word "said" referring to the party previously named. *Noel v. Williams*, 1 Dowl. 558.

But by stat. 3 & 4 W. 4, c. 42, s. 12, "in all actions on bills of exchange or promissory notes or other written instruments, any of the parties to which are designated by the initial letter or letters, or some contraction, of the christian or first name or names, it shall be sufficient, in any affidavit to hold

to bail, and in the process or declaration, to designate such persons by the same initial letter or letters, or contraction of the christian or first name or names, instead of stating the christian or first name or names in full."

And by R. G. H. 2 W. 4, s. 32, in all cases "where the defendant is described in the process or affidavit to hold to bail, by initials, or by a wrong name, or without a christian name, the defendant shall not be discharged out of custody or the bail bond delivered up to be cancelled, on motion for the purpose, if it shall appear to the court that due diligence has been used to obtain knowledge of the proper name." Where William Phillips was holden to bail by the name of James Phillips, and an application was made to discharge him out of custody, on the ground of this misnomer; it appeared by the plaintiff's affidavit that he inquired of the defendant's partner, who told him that the defendant's name was James, and that he had also made inquiry of the defendant's bankers: Patterson, J. held this to be sufficient inquiry, and discharged the rule. *Ladbroke v. Phillips*, 1 Har. & W. 109. See also *Rosset v. Hartley*, 5 Nev. & M. 415. *Callum v. Leeson*, 2 Cr. & M. 406. *Morgans v. Bridges, et al.* 1 B. & A. 647.

*Statement of the debt.*] The affidavit must show, to the satisfaction of the judge, that the plaintiff has "a cause of action against the defendant or defendants to the amount of twenty pounds or upwards, or has sustained damage to that amount." 2 & 3 Vict. c. 110, s. 3. The first part of the affidavit, therefore, states the debt or other cause of action, in the same manner as used formerly to be stated in an affidavit to hold to bail before the statute. And it must state a good cause of action. If, for instance, it be upon a special promise to pay a sum of money, it must show a consideration for the promise, and a breach. Where the affidavit stated a promise by the defendant to marry the plaintiff within a certain time, or pay her 1,000*l.*, it was holden insufficient, because it did not state any promise by the plaintiff to marry the defendant, or any other consideration for his promise to marry her. *Macpherson v. Lovie*, 1 B. & C. 108. So, an affidavit on articles of agreement, not stating the consideration, or showing that they were under seal, was holden bad. *Walker v. Gregory*, 1 Dowl. 24. So, where the affidavit stated that the defendant was indebted to the plaintiff in 50*l.*, under an agreement between them, by which the defendant agreed to forfeit 50*l.*; but it stated no breach of the agreement: the court held it to be insufficient. *Stinton v. Hughes*, 6 T. R. 13. See *Waters v. Joyce*, 1 D. & R. 150. And the affidavit must contain every averment, which would be necessary in a declaration for the same cause, to show a good cause of action. Therefore, where an affidavit stated the defendant to be indebted to the plaintiff in 1000*l.*, "under an

agreement in writing, whereby the defendant undertook to pay the plaintiff the balance of accounts, which balance is still due and unpaid," without stating that the balance was 1000*l.*, it was holden to be insufficient. *Hatfield v. Lingard*, 6 *T. R.* 217. So, where an award directed that one of two parties should pay the costs of the reference, and that the other should repay him on demand; and the former having paid these costs, made an affidavit of debt against the latter, stating the payment, but not alleging any demand of repayment; the court held this to be insufficient, even although the defendant was holden to bail under a judge's order. *Driver v. Hood*, 7 *B. & C.* 494. And see *Anon.* 1 *Dowl.* 5. So, an affidavit on an agreement to pay 25*l.*, as defendant's proportion of certain business the plaintiff was to procure his attorney to do, and which was done, was holden bad, because it did not state that the plaintiff had paid his attorney. *Townsend v. Burns*, 1 *Dowl.* 562. 2 *Crompt. and J.* 468. Where a party may be holden to bail in debt on statute, the affidavit must state all the facts necessary to bring the case within the words and meaning of the statute. See *Davis v. Mazzinghi*, 1 *T. R.* 705. *Watson v. Shaw*, 2 *T. R.* 654. *Holland v. Bothmar*, 4 *T. R.* 228. The affidavit must also show, either expressly or by necessary implication, that the sum sought to be recovered is due and payable, and unpaid, at the time of making the affidavit. *Smith v. Kendal*, 7 *D. & R.* 232. *Mackenzie v. Mackenzie*, 1 *T. R.* 716. *Anon.* 1 *Dowl.* 5. See *Phillips v. Turner*, 3 *Dowl.* 163. *Barnard v. Nevill*, 3 *Bing.* 126. See *Shepherd v. O'Brian*, 1 *Mees. & W.* 601. If, however, any thing stated in an affidavit can be rejected as surplusage, it shall not vitiate it. And, therefore, where an affidavit stated that Randle Sutton was indebted to the plaintiff in a certain sum, for money paid by the plaintiff for the said Randle Jackson, the court held that, as there was nothing in the affidavit to satisfy the word "said," if "Jackson" were to be retained, the word "Jackson" might be rejected as surplusage, and the affidavit would then be good. *Hughes v. Sutton*, 3 *M. & S.* 178. And see *Noel v. Williams*, 1 *Dowl.* 558, *ante*, p. 142. Care must be taken that the cause of action to be stated in the affidavit, be that for which the plaintiff intends to declare; otherwise the court, upon application, will order an exoneretur to be entered on the bail-piece, or, if bail be not perfected, will order the bail bond to be delivered up to be cancelled, or the defendant to be discharged. *Spalding v. Mure*, 6 *T. R.* 363. *Tetherington v. Golding*, 7 *T. R.* 80. *Atwood v. Rattenbury*, 5 *Moore*, 209. And see *Brookes v. Clark*, 2 *D. & R.* 148.

The necessary facts also must be stated with sufficient particularity, that the court may see whether a bailable cause of action is stated in it or not. Therefore a mere general statement of the cause of action, as that the defendant is indebted

in so much "on promises," *Cope v. Cooke*, 2 *Doug.* 467, or "upon breach of articles," 1 *Tidd.* 183, or "in trover," *Hubbard v. Pacheco*, 1 *H. Bl.* 218, or the like, or a general statement that the defendant is indebted to the plaintiff in the sum of 500*l.* without stating for what cause, *Cooke v. Dobree*; and see *Polleri v. De Souza*, 4 *Taunt.* 154, would be bad. And the facts must be stated with such certainty, that an indictment for perjury may be maintained, if it be really false. In one case where the affidavit stated the defendant to be indebted to the plaintiff in the sum of 500*l.* "upon an account stated between" them, without alleging that it was stated by them, or by the defendant: *Coleridge, J.* (after consulting the other judges of the King's Bench), held it to be bad; because consistently with the affidavit, the account might have been stated by a third person, without the privity or consent of the parties, and no debt actually subsist. *Hooper v. Vestris*, *T.* 1837, *M. S.* But this case was at first doubted, *Debenham v. Chambers*, 6 *Dowl.* 101, and has since been over-ruled; *Balmanno v. May*, *Id.* 526. *Tyler v. Campbell*, 3 *Bing, N. C.* 675; and now, if the cause of action be stated in the affidavit, with the same certainty as in a declaration, it will be deemed sufficient. *Id.* The allegation, however, that the defendant "is indebted" to the plaintiff, will not aid the statement in the affidavit in this respect, *Kelly v. Curzon*, 1 *Har. & W.* 678, per *Littledale, J.*, although it may perhaps in others. See *Coppinger v. Beaton*, 8 *T. R.* 338. *Lambert v. Wray*, 3 *Dowl.* 169. *Pickman v. Collis*, *Id.* 429. *Masters v. Billing*, *Id.* 751.

The statement also must be positive, and not merely by way of argument. Thus, where in an action for double rent, for holding over, the affidavit stated the notice to quit, and the holding over, whereby an action accrued, &c.: the court held it bad, because it merely stated the debt by way of argument; and they accordingly discharged the defendant. *Wheeler v. Copeland*, 5 *T. R.* 364. Where the affidavit stated an agreement for the sale of some property, the sale, and the value, by reason whereof the defendant became indebted to the plaintiff in a certain sum, that the plaintiff received only so much on account, by reason whereof the defendant was indebted to him in so much, &c.: this was holden bad, for the same reason. *Fowler v. Morton*, 2 *B. & P.* 48; and see *Elworthy v. Maunder*, 5 *Bing.* 295. *Long v. Lynch*, 3 *Wils.* 154. Also, swearing to a debt, "as appears by" certain books or papers, or by any similar reference to documents, *Powell v. Portherch*, 2 *T. R.* 55. *Williams v. Jackson*, 3 *T. R.* 575. *Anon.* 1 *Wils.* 121. *Rollin v. Mills*, 1 *Wils.* 279. *Kelly v. Devereux*, 1 *Wils.* 339. *Jennings v. Martin*, 3 *Burr.* 1447, or as deponent has been informed and believes, or the like, renders the affidavit bad;—except in the case of executors and assignees of bankrupt, (See *Appendix*, tit. "Affidavit to hold to bail,") or in the

statement of the amount of damage sustained, in an action for a tort. *Hodgson v. Dowell*, 6 Dowl. 344. Where the affidavit stated that the defendant "in" indebted, instead of "is" indebted, it was holden bad. *Reeks v. Groneman*, 2 Wils. 224. Where it stated the defendant to be indebted, but did not say to the plaintiff, it was also holden insufficient. *Balbi v. Batley*, 6 Taunt. 25.

And lastly, one affidavit cannot be made, to hold to bail in two or more actions, either stating debts as due to different plaintiffs, *Dean of Exeter v. Seagell*, 6 T. R. 688, or from different defendants. *Hussey v. Wilson*, 5 T. R. 254. *Gilly v. Lockyer*, 1 Doug. 217. *Goodwin v. Parry*, 4 T. R. 577. The affidavit in such a case is void, and may be objected to at any time, even after the defendant has taken a step in the cause. *Hussey v. Wilson*, 5 T. R. 254. There is no objection, however, to include in one affidavit, several causes of action, which may be included in the same declaration. See the Appendix, tit. "*Affidavit to hold to bail.*"

[*Statement that the defendant is going abroad.*] The affidavit must show, to the satisfaction of the judge, "that there is probable cause for believing that the defendant, or any one or more of the defendants, is or are about to quit England, unless he or they be forthwith apprehended." 2 & 3 Vict. c. 110, s. 3. It is not necessary, however, to show that the defendant is about to quit England, to evade the process of the court or the payment of the debt; it is sufficient if facts are stated sufficient to satisfy the judge that he is about to leave England for such a time, that he is not likely to be forthcoming to satisfy the plaintiff's execution, at the period when he will be entitled to it in the ordinary course of proceeding. And, therefore, the Court of Exchequer held that an order might be made to arrest a defendant, who was an officer in the army, and was about to go to Ireland for the purpose of joining his regiment there. *Larchin v. Willan*, 4 Mees. & W. 351, 8 Law J. 19 *ex.* It will not be sufficient, however, to state merely the plaintiff's suspicion of the defendant's intention to quit England, but facts must be stated, to satisfy the judge that there is probable cause for believing such to be the case. See *per Coleridge, J.*, in *Harvey v. O'Meara*, 7 Dowl. 736. In one case it was holden by the Court of Common Pleas, that besides these facts, the deponent should add his belief that the defendant was about to quit the country; *Bateman v. Dunn*, 5 Bing. N. C. 49, 8 Law J. 17 *cp.*; in another, the Court of Exchequer held that although this was usual, it was not necessary, because by the terms of the statute it is the judge who has to form his belief upon the subject, and not the plaintiff. *Willis v. Snook*, 8 M. & W. 147, 10 Law J. 266 *ex.* It will perhaps be safer to add the plaintiff's belief; for facts may be stated to induce the

judge to believe it to be the defendant's intention to leave England, and the plaintiff at the time may have knowledge of other facts which would disprove the intention.

*Jurat.*] The jurat, if the affidavit be sworn before a judge, is thus :—"sworn at my chambers in Roll's Gardens, Chancery Lane, this — day of — 1842, before me, —." Or if before a commissioner :—"Sworn at — in the county of — this — day of — 1842, before me,

L. M.,

*A commissioner of the said Court of  
Queen's Bench [or C. P. or Ex.]"*

Where the affidavit was sworn before a judge, and the deponent signed it, and was sworn to it, but it was not signed by the judge, before the order was made, nor until after the *capias* had issued, and the defendant was arrested upon it : the court held that this was not an affidavit, at the time the order was made, and they set aside the order and *capias* for irregularity. *Bill v. Bament*, 9 Dowl. 810.

*When to be made.*] The affidavit should be made shortly before the suing out of the process. Where it was made in July, 1744, at a time when the plaintiff was going abroad, and the process was not sued out until May, 1747, the court discharged the defendant on common bail, saying, that although the debt might be due in 1744, it did not follow that it was still owing in 1747. *Collier v. Hague*, 2 Str. 1270. It remains in force for one year; *Ramsden v. Maugham*, 4 Dowl. 403; after which process cannot regularly be sued out upon it. *Pitches v. Davey*, 1 Tidd. 192. *Stewart v. Freeman*, *Id.*

*Where made.*] The affidavit may be made in this country, or in Ireland, Scotland, any of the British colonies, or in any foreign country; the only distinctions are, as to the person before whom it is to be sworn. *O'Mealy v. Newell*, 8 East, 364. *French v. Bellew*, 1 M. & S. 302. Although made in a foreign country, it must be in the English language, and interpreted, if necessary, to the deponent, *See Marzetti v. Joffroy*, 1 Dowl. 41, and it must state the sum as in "pounds sterling English." *Picardo v. Machado*, 4 B. & C. 886. In other respects, these affidavits must be the same as those sworn in this country. *Nesbit v. Pym*, 7 T. R. 376 n.

*By whom.*] It is usually made by the plaintiff himself. But it may be made by his agent or collector, *Short v. Campbell*, 3 Dowl. 481, 1 Gale, 60, and see *Monro v. Spinks*, 8 T. R. 284. *Cass v. Levy*, 8 T. R. 520, or by any other person who will swear positively to the debt, *King v. Lord Turner*, 1 Chi 58. *Luytjes*, 1 B. & P. 1. *Andriou v. Morgan*, 4 Taunt. 231, a

the court will not inquire into the deponent's means of knowledge. *Per Coleridge, J. in Harrison v. Turner*, 4 Dowl. 75. And it is no objection to say that the deponent has been convicted of a conspiracy, *Park v. Strockley*, 4 D. & R. 144, or of felony. *Anon 1 Chit.* 165.

*Before whom sworn.*] The affidavit may be sworn before the officer who issues the first process; 12 G. 1, c. 29; formerly, in the Queen's Bench, before the signer of the writs; in the Common Pleas, before the filacer for the proper county; in the Exchequer, before one of the masters, or his deputy signer of the writs; but now before one of the masters, or before the clerk or deputy in the master's office whose duty it may be to sign the writs. Where an alias or pluries capias therefore is sued out, if it be sued out within the time limited by the judge's order, it is not necessary that there should be a fresh affidavit of debt, because there is already an affidavit made before the officer who issued the first process. Even formerly in the Common Pleas, where the filacer, who issued the alias and pluries, was not always the same who issued the first writ, there, although the alias were issued by a different officer, it was not necessary to file with him a fresh affidavit of debt, but it was sufficient if you obtained an office copy of the affidavit already made, from the office where it was filed, and filed it with the filacer who signed the alias, &c. See *Baker v. Allen*, 7 B. & C. 526. *Rodwell v. Chapman*, 1 Dowl. 634. A plaintiff, however, sometimes, instead of suing out an alias or pluries, sues out a capias into a different county. And in such cases, as in all the courts at present, such writs are always signed by the same officer who signed the first writ, a fresh affidavit to hold to bail is not necessary. See *Ramsden v. Maugham*, 4 Dowl. 403. *Rock v. Johnson*, *Id.* 405. and see *Young v. Beck*, 1 Cr. M. & R. 448, overruling *Beck v. Young*, 2 Dowl. 462. Where an affidavit purported to be sworn "at the King's Bench office before Thomas Chambre," it was holden sufficient, although it did not appear upon the face of it that Thomas Chambre was an officer of the court. *Howell v. Wilkins*, 7 B. & C. 783. And where an affidavit purported in the jurat to be sworn before J. Y. "deputy filacer," it was holden good, although not intituled in the court. *Bland v. Drake*, 1 Chit. 165. If the affidavit be made by a foreigner, not understanding the English language, an interpreter must be sworn to interpret it to him, he must be sworn to his interpretation, and all this must be stated in the jurat. *Marzetti v. Jouffroy*, 1 Dowl. 41.

In the country, the affidavit is sworn before a commissioner of the court for taking affidavits; and it is no objection that such commissioner is the plaintiff's attorney. *R. G. H.* 2 W. 4, s. 6. In town, it may be sworn in court, or before a judge of

the court; 12 G. 1, c. 29; or before a judge of any other of the courts of law at Westminster, if it be intituled of the court in which it is to be used. *R. G. H. 2 W. 4, s. 4.*

In Ireland, Scotland, and the colonies, an affidavit sworn before a magistrate, was always deemed sufficient to obtain a judge's order to hold to bail in this country, upon the signature to the jurat, and the authority of the magistrate to take affidavits, being verified by an affidavit made in this country. *See Sharp v. Johnston, 2 Bing. N. C. 246, 4 Dowl. 324.* So an affidavit, purporting to be sworn before the chief justice of the King's Bench in Ireland, and the signature verified by an affidavit made here, has been holden sufficient to obtain a judge's order to hold to bail in this country, although the place where the affidavit was sworn was not mentioned in the jurat. *French v. Bellew, 1 M. & S. 302.* By 3 & 4 W. 4, c. 42, s. 42, however, the courts of law at Westminster were empowered to appoint commissioners in Ireland and Scotland, for taking affidavits; and they have accordingly done so. Whether, since the appointment of these commissioners, an affidavit sworn before a justice of the peace in Ireland or Scotland, as formerly, can be received in the courts in this country, has not been decided. *See Sharp v. Johnston, 2 Bing. N. C. 246, 4 Dowl. 324.* If the affidavit be sworn before one of these commissioners, his signature to the jurat need not be verified by affidavits as formerly. As to the jurat in such a case, *See Daley v. D'Arcy Mahon, 6 Dowl. 192.*

In foreign countries, the affidavit may be sworn before the mayor or other magistrate of the place; and upon his signature to the jurat, and his authority to administer oaths and take affidavits, being verified by an affidavit made in this country, a judge's order may be obtained upon it for holding the defendant to bail. *O'Mealy v. Newell, 8 East, 364. and see Dalmer v. Barnard, 7 T. R. 251.* Whether an affidavit can legally be sworn before a British consul in a foreign country has been doubted; *Picardo v. Machado, 4 B. & C. 886;* it may, perhaps, before a consul general. *See 6 G. 4 c. 87, s. 20. Re Barber, 4 Dowl. 640.*

*Discharge of defendant, when, &c.]* If the affidavit be insufficient, by reason of any defect in the title, the body of it, or the jurat, as already mentioned, the court upon application will discharge the defendant, or order the bail bond (if he have given one) to be delivered up to be cancelled, on his entering a common appearance. This application, however, must be made within a reasonable time, otherwise the court will not entertain it. *Powell v. Petre, 5 Dowl. 276, 1 Nev. & P. 227. Firley v. Rallett, 2 Dowl. 708, and see Mammatt v. Mathews, 2 Dowl. 797.* The court have also refused to entertain it,



after bail perfected, *Chapman v. Snow*, 1 B. & P. 132. *Jones v. Price*, 1 East, 81, or after bail put in, *Dalton v. Barnes*, 1 M. & S. 230. *D'Argent v. Vivant*, 1 East, 334. *Morgan v. Bayliss*, 3 Dowl. 117. *Reeves v. Hucker*, 2 Tyr. 161, though put in merely for the purpose of render, *Shawman v. Whalley*, 6 Taunt. 185, or, it seems, after the time for putting in bail has expired. *Tucker v. Colegate*, 2 Crompt. & J. 489. And where a defendant, hearing that a bailable writ was out against him, voluntarily gave a bail bond, the court held that he could not afterwards object to the affidavit to hold to bail. *Norton v. Danvers*, 7 T. R. 375.

Formerly defects in an affidavit might, in some cases, be remedied by a supplemental affidavit, in the court of Common Pleas, but not in the court of King's Bench. Now, however, by R. G. H. 2 W. 4, s. 9, "no supplemental affidavit shall be allowed, to supply any deficiency in the affidavit to hold to bail."

On the other hand, the defendant will not be allowed to contradict the cause of action stated in the affidavit to hold to bail, *Imlay v. Ellefsen*, 2 East, 453. *Smith v. Fraser*, 1 W. Bl. 192. *Brackenbury v. Needham*, 1 Dowl. 439. Nor will the court receive any explanation from him, by way of confession and avoidance of the facts stated in such affidavit; *Emmerson v. Hawkins*, 1 Wils. 335, *Say*, 53. *Massel v. Angel*, 6 D. & R. 15; although there are some instances of the court of Common Pleas having formerly done so. See *Young v. Moore*, 2 Wils. 67. *Shaw v. Hawkins*, *Barnes*, 66. *Manning v. Williams*, *Barnes*, 58. But the general rule is, that the court will not enter into any examination of the merits, upon a motion to discharge a defendant upon entering a common appearance, or to have the bail bond delivered up to be cancelled. *Per Holt, C. J.* 1 Salk. 100. *Birch v. Douglas*, *Barnes*, 52. *Burton v. Haworth*, 1 Nev. & M. 318. *M'Ginnis v. M'Curling*, 6 D. & R. 15. Even where the plaintiff, having holden the defendant to bail, and having also proceeded in equity for the same matter, was put to his election there, and elected to proceed in equity, and thereupon a perpetual injunction was granted as to the action at law: the court of Common Pleas refused to interfere. *Horsley v. Walstab*, 7 Taunt. 285. And that court also refused to order the bail bond to be cancelled, on an affidavit that the plaintiff could not be found. *Brown v. Moore*, 4 Bing. 148. There have been, however, some few exceptions to this, under peculiar circumstances. Where the defendant was holden to bail on a bill of exchange or order, and by the declaration it afterwards appeared that the instrument was a mere order for the payment of money, when it should be received from a third person; the court discharged the defendant on common bail. *Wilks v. Adcock*, 8 T. R. 27. So,

where it appeared that, shortly before the arrest, the plaintiff in his schedule in the insolvent court described the defendant as a creditor for £4000, and also in a letter mentioned him as one of his principal creditors: the court granted a rule nisi to discharge the defendant; and these facts not being denied in answer, they made the rule absolute. *Nizetich v. Bonacich*, 5 B. & A. 904. So, where in 1835, the defendant was arrested for £72 alleged to be due for the board and maintenance of his children from the year 1818 to 1823: the court of Common Pleas, upon an affidavit that the money had been paid, granted a rule nisi to discharge the defendant; and upon cause shewn afterwards, the matter was referred to the prothonotary. *Tucker v. Tucker*, 1 Hodg. 15. So, where the defendant was arrested for the penalty in a bastardy bond, and applied to be discharged upon an affidavit that the sum of £3 only was due: the court expressed great indignation at the arrest, but doubted whether they could relieve the defendant upon motion; at last, however, they granted the rule, intimating their persuasion that the plaintiff would not shew cause against it. *Kirk v. Strickland*, Doug. 432. So, where the affidavit alleged that the defendant was indebted to the plaintiffs in a sum for money lent to him by them and their late partner deceased: the court of Exchequer, upon an affidavit that the other partner was still alive, ordered the bail bond to be delivered up to be cancelled. *Morrell et al. v. Parker*, 6 Dowl. 123. But in a case where it appeared that after the plaintiff had holden the defendant to bail for money lent, the defendant made an affidavit of certain facts upon which he obtained a judge's order for holding the plaintiff to bail, and the plaintiff afterwards applied to be discharged out of custody, upon an affidavit stating certain facts, which were somewhat inconsistent with his first affidavit of bail, and which coupled with the affidavit of the defendant, shewed that the plaintiff had no cause of action: still the court of Exchequer refused to order the bail bond to be cancelled, because it would be trying the merits upon the affidavits of the parties. *Vaughan v. Goodby*, 3 Mees. & W. 143.

### 3. The Capias.

*How directed.*] The writ is directed "to the sheriff of —," or "to the constable of Dover Castle," or "to the mayor and bailiffs of Berwick-upon-Tweed," or as the case may be. 2 & 3 Vict. c. 110, sch. 1. There is but one sheriff appointed to each county in England. In Middlesex, although two individuals exercise the office of sheriff, yet in contemplation of law they constitute but one sheriff. And where a capias was directed to the sheriffs of middlesex, it was set aside for irregularity, and the defendant discharged out of custody. *Jackson v. Jack-*

*son*, 1 Cr. M. & R. 438. Where there was a mistake in the direction, "Middesex" for "Middlesex," Parke, B. seemed to think it immaterial, as it could not mislead; *Colston v. Berens*, 3 Dowl. 253; but in a previous case, where the same mistake occurred in the copy of a capias which was served upon an arrest, the court of Queen's Bench discharged the defendant, upon entering a common appearance. *Hodgkinson v. Hodgkinson*, 2 Dowl. 535, 3 Nev. & M. 564. There are some districts in England, which, although parcel of one county, are situated within and surrounded by some other county; a writ intended to be executed in such a place, may be directed to the sheriff of either county. 2 W. 4, c. 39, s. 20.

London has two sheriffs, and a capias to them must be directed accordingly; where it was directed to the *sheriff* of London, the court set it aside for irregularity, and discharged the defendant out of custody. *Barker v. Weedon*, 2 Dowl. 707. *Nichol v. Boyne*, *id.* 761. And see *Irving v. Heaton*, 4 Dowl. 638. *Clutterbuck v. Wiseman*, 2 Crompt. & J. 213.

The cities of Bristol, Coventry, Gloucester, Lincoln, Norwich, and York, and the town of Nottingham, formerly had two sheriffs each; the cities of Canterbury, Exeter, and Worcester, the city of Lichfield, and county of the same city, the town and county of Kingston-upon-Hull, the town and county of Newcastle-upon-Tyne, the town and county of Poole, and the town and county of Southampton, had but one each. But by the Municipal Reform Act, 5 & 6 W. 4, c. 76, s. 61, it is enacted, "that in the city of Oxford, in the town of Berwick-upon-Tweed, and in the counties of the cities of Bristol, Canterbury, Chester, Coventry, Exeter, Gloucester, Lichfield, Lincoln, Norwich, Worcester, and York, and in the counties of the towns of Carmarthen, Haverfordwest, Kingston-upon-Hull, Newcastle-upon-Tyne, Nottingham, Poole, and Southampton, the council shall, on the first day of November in every year, appoint a fit person to execute the office of sheriff, with the like duties and powers as the sheriff or the person filling the office of sheriff in the said town and counties respectively would have had if this act had not passed." In the city of Oxford, before this act, the office of sheriff was executed by two bailiffs, but they had not the return of writs issued from the courts at Westminster, those writs being always directed to the sheriff of the county; and since the act, it has been holden, upon the latter words of the above section, that writs, intended to be executed in the city of Oxford, must still be directed to the sheriff of the county, although a sheriff is now appointed for the city. *Grainger v. Taunton*, 3 Bing. N. C. 64. So, if the writ is to be executed within a liberty or franchise, it must be directed to the sheriff of the county in which such liberty, &c. is situate. And therefore a writ, to be executed in the borough of Southwark, must be directed to the sheriff

of Surrey; *Bowring v. Pritchard*, 14 East, 289; a writ, to be executed in the Isle of Ely, must be directed to the sheriff of Cambridgeshire. *Grant v. Bagge*, 3 East, 128.

A capias to the county Palatine of Lancaster, is directed "to the chancellor of our county Palatine of Lancaster or his deputy there;" and requires him by writ under the seal of the county Palatine, to command the sheriff to take the defendant, &c. See the form, R. G. M. 3 W. 4, r. 2. To the county Palatine of Durham, the writ is directed "to the Reverend father in God, ———, by divine providence, lord bishop of Durham, or to his chancellor there," and commands that by writ under the seal of the bishopric, directed to the sheriff of the county, he cause the sheriff to be commanded to take, &c. See the form in the Appendix; and see *Bracebridge v. Johnson*, 1 Brod. & B. 12. And it may now issue for any sum amounting to 20l. or upwards, although formerly an arrest in a county Palatine, under mesne process from the courts at Westminster, for a debt under 50l., was prohibited by stat. 7 & 8 G. 4, c. 71, s. 7, *Brown v. M'Millan*, 7 Mees. & W. 196.

If one of two sheriffs be interested in the matter of suit, the writ must be directed to the other; *Letson v. Birkley*, 5 M. & S. 144; but if both, or where there is but one, if that one be interested, the writ must be directed "to the coroners of our county of ———," and if the coroners also be interested, then to Elisors. See the *Mayor of Norwich v. Gill*, 8 Bing. 27. Where a writ is thus directed to the coroner, &c., it is not necessary that it should state upon the face of it the reason for its being so directed. *Bastard v. Gutch*, 1 Har. & W. 321.

*Tests and duration of the writ.*] The capias must "bear date on the day on which the same shall be issued," 2 & 3 Vict. c. 110, s. 3, and "shall be tested in the name of the lord chief justice or lord chief baron of the court from which the same shall issue, or in case of a vacancy of such office, then in the name of a senior puisne judge of the said court." 2 W. 4, c. 39, s. 12. See *Anon.* 1 Dowl. 654. *Wakeling v. Watson*, 1 Cramp. & J. 467.

The writ is in force for one calendar month only, after the date of it, not including the day of the date; 2 & 3 Vict. c. 110, s. 4; at least, the statute requires the arrest to be within that time. *Id.* Vide post.

*Parties.*] Care must be taken that the writ correspond with the affidavit to hold to bail, in the names and numbers of the parties, plaintiffs and defendants: for if there be any material variance in this respect, so that the affidavit will not warrant the writ, the court upon application will discharge the defen-

dant, or order the bail-bond to be delivered up to be cancelled, on entering a common appearance. So the writ must include all those as defendants, and only those against whom you intend to declare: you cannot have a writ against two, and declare against one; *Holland v. Johnson*, 4 T. R. 695. *Carson v. Dowling*, 1 Har. & W. 507, 4 Dowl. 297; nor one writ against some of the defendants, and another against the others; *R. G. M.* 3 W. 4, r. 1; otherwise the court will set aside the declaration for irregularity, there being no process to warrant it.

Care must be taken, in inserting the defendant's name, to state it correctly. If the christian name be omitted, *Tomlin v. Preston*, 1 Chit. 397, or if the defendant have two christian names, and one of them be omitted, *Arbouin v. Willoughby*, 1 Marsh. 477, the court will set aside the writ for irregularity, and order the defendant to be discharged, or the bail bond delivered up to be cancelled, unless the irregularity have been waived by some act of the defendant. See *Kingston v. Llewellyn*, 1 Brod. & B. 529. *Walker v. Willoughby*, 6 Taunt. 530. So, if merely the initial of the christian name be inserted, the court will interfere in the same manner; *ante*, p. 142; unless the action be upon a bill of exchange, promissory note, or other written instrument, in which the christian or first name of the defendant is designated by an initial or contraction, in which case the same designation will be sufficient in the process. 3 & 4 W. 4, c. 42, s. 12, *ante*, p. 142. So if the christian name be mistaken, the court will discharge the defendant, or order the bail-bond to be delivered up to be cancelled; *Ladbrook v. Phillips*, 1 Har. & W. 109, *ante*, p. 142; and the same, it should seem, if there be a mistake in the surname; see *Finch v. Cocken*, 1 Gale, 130; unless it appear that he at the same time passed by the name in which he is sued. See *Walker v. Willoughby*, 6 Taunt. 530. *Price v. Harwood*, 3 Camp. 108. But by R. G. H. 2 W. 4, s. 32, in all cases "where the defendant is described in the process or affidavit to hold to bail, by initials, or by a wrong name, or without a christian name, the defendant shall not be discharged out of custody, or the bail bond delivered up to be cancelled, on motion for the purpose, if it shall appear to the court that due diligence has been used to obtain knowledge of the proper name." See *ante*, p. 143. Also if the name used be *idem sonans* with the real name, the court will not interfere. *Webb v. Lawrence*, 2 Dowl. 81. In moving for a rule in any of these cases, the affidavit must be intitled in the right name,—as John Fox, sued by the name of James Fox,—John Robinson, sued by the name of J. Robinson,—James Cocken, sued by the name of James Cocker,—or the like. *Shaw v. Robinson*, 8 D. & R. 423. *Finch v. Cocker*, 2 Dowl. 383.

But a misnomer of the plaintiff cannot be taken advantage of in this way; *Morley v. Law*, 2 Brod. & B. 34; nor is it matter of objection at the trial. *Broughton v. Frere*, 3 Camp. 29. Formerly, besides the name, some description must have been given of the defendant or his place of abode, in order to assist the sheriff or his officer in finding him. In the form of the capias given in stat. 2 W. 4, c. 39, the defendant is described as "*Joseph Styles of ———*," evidently intimating that some description must be given. But in the form given in the schedule to the present statute (2 & 3 Vict. c. 110,) "*of ———*" is omitted, and the defendant described as C. D. only; and therefore it should seem that any addition would now be unnecessary.

*Cause of action, &c.*] The form of the capias given in the statute, describes the cause of action, as "*In an action on promises, or of debt, &c.*" And the court require the action to be described as here mentioned: where it was "*an action of trespass on the case upon promises,*" the court held it irregular; but as the application to set it aside was not made in time, they refused to interfere. *Gurney v. Hopkinson*, 3 Dowl. 189, and see *King v. Sheffington*, 1 Dowl. 686.

Care must be taken that in the description of the action also, the writ correspond with the affidavit to hold to bail; otherwise, the court, upon application, will discharge the defendant out of custody, or order the bail bond to be delivered up to be cancelled, upon entering a common appearance. Also, care should be taken that the form of action mentioned in the writ, be that for which you intend to declare: for although a variance between the declaration and writ in this respect will not affect the writ, or discharge the bail, it being an irregularity in the declaration only, *Ward v. Tummon*, 4 Nev. & M. 876. See *Addis v. Jones*, 3 Dowl. 164. *Edwards v. Dignam*, 2 Dowl. 240, yet the court will set aside the declaration. *Ward v. Tummon*, *supra*.

Trifling omissions, &c., in the body of the writ, however, which do not alter the sense, have usually been holden to be immaterial. See *Sutton v. Burgess*, 3 Dowl. 489, 1 Gale, 17. *Pocock v. Mason*, 1 Bing. N. C. 245, 3 Dowl. 104. *Bridgman v. Curgenven*, 3 Dowl. 1.

*How indorsed.*] There are three several indorsements required upon a capias: 1st, as to the sum sworn to; 2d, as to the name and address of the attorney or person issuing it; 3dly, as to the amount of the plaintiff's claim for debt and costs: as in the forms, in italics, *infra*.

"Bail for ——— pounds, by order of ———" [naming the judge making the order] "*dated this ——— day of ———.*" This indorsement is required by stat. 2 & 3 Vict. c. 110. *sch. No. 1.*

"This writ was issued by E. F. of —, attorney for the plaintiff [or plaintiffs] within named." Or, "This writ was issued in person by the plaintiff within named, who resides at [mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be]. The form of this indorsement is given by stat. 2 & 3 Vict. c. 110, sch. No. 1. Where two or more attorneys are in partnership, it is sufficient to indorse the name of the firm, without giving the christian names; *Pickman v. Collis*, 3 Dowl. 429; even where an attorney carried on business in the name of a firm, it was holden sufficient for him to indorse the name of the firm. *Hartley v. Rodenhurst*, 4 Dowl. 748. As to the residence: "Gray's Inn square, London," has been holden sufficient, even although Gray's Inn be not in London; *King v. Monkhouse*, 2 Dowl. 221; so, "Gray's Inn, London," has been deemed sufficient. *Engleheart v. Eyre*, 2 Dowl. 145. But "Southampton Buildings," without more, has been holden insufficient. *Rust v. Chis*, 3 Dowl. 565. And where the indorsement on the writ was "Old Jewry, London," but on the copy "London" was omitted, it was holden bad. *Smith v. Pennell*, 2 Dowl. 654.

If the writ be sued out by a London agent for a country attorney, "the name and place of abode of such country attorney shall also be indorsed upon the writ." *R. G. M. 3 W. 4, s. 9*. The indorsement then may be thus: *This writ was issued by John Smith, of No. 3, Elm Court, Temple, agent for James Walker, of Beverley in the East Riding of the county of York, attorney for the plaintiff within named.* But if the plaintiff be an attorney, and the writ be in fact sued out by his agent, the indorsement must not describe the latter as agent, but as attorney, for the plaintiff; where it described him as agent, the court upon motion set aside the capias for irregularity. *Lloyd v. Jones*, 1 Mees. & W. 549.

If there be no indorsement of the name, &c., of the attorney, on the writ or copy, the court will set it aside for irregularity, and discharge the defendant, or order the bail bond to be delivered up to be cancelled. Where the name of an attorney, who was not an attorney of the court, was indorsed, the court stayed the proceedings until the name of some other attorney should be substituted, and ordered the attorney whose name was indorsed to pay the costs of the application. *Constable v. Johnson*, 1 Crompt. & M. 38.

By stat. 2 W. 4, c. 39, s. 17, upon demand in writing, the attorney whose name shall be so indorsed on the writ, shall declare whether it was done with his authority or privity; see *ante*, tit. "Attorney;" and by *R. G. M. 3 W. 4, s. 14*, if he declare that the writ was not issued by him, or with his authority or privity, "all proceedings upon the same shall

be stayed until further notice." See *Oppenheim v. Harrison*, 1 Burr. 20. *Gilson v. Carr*, 4 Dowl. 618.

It was formerly necessary to indorse the defendant's addition and place of abode upon the writ; *R. H. 2 & 3 G. 4*; and although that rule was virtually repealed by stat. 2 W. 4, c. 39, which required a description of the defendant in the body of the writ, as mentioned *ante*, p. 155, *Bodfield v. Padmore*, 5 B. & Ad. 1095, yet as such a description does not now seem to be necessary, it may be prudent to make such indorsement.

*How sued out, &c.*] Upon the order being granted, "it shall be lawful for such plaintiff, within the time which shall be expressed in such order, but not afterwards, to sue one or more writ or writs of capias into one or more different counties, as the case may require, against any such defendant so directed to be held to bail," which writ shall be in the form given by the statute (see the form in the Appendix), and shall bear date on the day on which the same shall be issued. 2 & 3 Vict. c. 110, s. 3.

Write upon plain paper a præcipe in this or the like form :

*Middlesex : Capias for John Nokes against Joseph Styles of Oxford-street in the county of Middlesex, in an action [on promises "or" of debt," &c.] for £50.*

*By order.*

*A. B. attorney, 1833.*

This præcipe, it must be observed, is merely a memorandum in the nature of instructions to the officer who signs, and who is supposed to make out the writ : it is no part of the process of the court, nor can any advantage be taken of any omission or irregularity in it. See *Boyd v. Durand*, 2 Taunt. 161. *Usborne v. Pennell*, 2 Dowl. 801. Get a blank writ on parchment, and as many copies on paper as there are defendants ; fill up the writ very carefully, with the indorsements, &c. and the copies exactly in the same manner. Take the præcipe, writ and order to the master's office, and the deputy signer of the writs will sign the writ, and file the præcipe and order. Take the writ then to the sheriff's office, or in country cases, either to the office of the undersheriff in the country, or to the office of his agent in London, and obtain a warrant upon it. And lastly, take the warrant and the copies of the writ to the officer, who will thereupon execute the same. Afterwards in suing out an alias or pluries writ, it will not be necessary to make or file a fresh affidavit, or obtain a fresh order, if such alias or pluries be sued out within the time expressed in the order.

The affidavit will now be filed at the judge's chambers, and the judge's order will serve as authority to the signer of the writs to sign the capias.



The statute does not expressly require a copy of the writ to be served on the defendant, as was required formerly; but as it appears clearly, from the reference to the defendant in the body of the writ, the warning subscribed to it, and the indorsements upon it, that it was intended that the defendant should have a full knowledge of it, it will be prudent in all cases (at least until there shall be some decision to the contrary) to furnish the officer with as many copies as there are defendants, and that he should serve them on the defendants arrested, at the time of the arrest, as in the like cases before this Act. See *Sugars v. Concanon*, 8 Law, J. 159, *ex.* And according to the practice under the late statute, great care must have been taken that these copies were correct. In a case where the writ was filled up correctly, but the copy omitted to state to what sheriff it was directed, or in what court the defendant was to put in bail, the court set it aside for irregularity, and ordered the bail-bond to be delivered up to be cancelled. *Street v. Carter*, 2 Dowl. 671. Even where the copy of a capias appeared to be directed to the sheriff of *Middlesex*, omitting the letter "l," it being correctly spelt in the writ, the court set it aside, and discharged the defendant, upon entering a common appearance. *Hodgkinson v. Hodgkinson*, 2 Dowl. 535, 3 Nev. & M. 564. but see *Colston v. Berens*, 3 Dowl. 253. And the same, where the writ was dated, and the copy not; *Byfield v. Street*, 2 Dowl. 739; *Smart v. Johnson*, 3 Mees. & W. 69; and where the place of residence of the attorney in the indorsement on the writ was "Old Jewry, London," and the copy omitted "London;" *Smith v. Pennell*, 2 Dowl. 654; where in the writ the defendant was described as gentleman, and this description was omitted in the copy. *Cook v. Vaughan*, 4 Mees. & W. 69. An application upon this ground, however, must be made within a reasonable time, as a defect of this description in the copy is merely an irregularity. *Edwards v. Collins*, 5 Dowl. 227.

A mistake or omission in the warrant will not affect the writ, or any arrest made under it, or entitle the defendant to be discharged out of custody. *Astley v. Goodjer*, 2 Dowl. 619. Where the warrant upon a writ directed to the sheriff of Shropshire, was obtained from the undersheriff's agent in London, and sent by post to the officer in the country; but the postage not being paid, the officer refused to take it in, and it was returned to the dead letter office: the court under these circumstances set aside a rule which had been obtained to return the writ, saying that the plaintiff's attorney was to blame in not having paid the postage of the letter. *Hart v. Weatherley*, 4 Dowl. 171. By stat. 7 & 8 G. 4, c. 71, s. 8, 9, sheriffs were prohibited from granting a warrant to any person but an attorney or his clerk; but this seems to be virtually repealed by stat. 2 W. 4, c. 39.

As to the execution of this writ see the next section.

The old statutes as to officers' fees are now repealed, and sheriff's officers hereafter shall demand or take only such fees, &c. as are allowed by the master in taxation: if they demand or receive more, or if any person under pretence of being an officer shall demand or receive greater fees, &c. they shall be adjudged guilty of a contempt of the court, and be punished accordingly; and the court may award costs to the party complaining. 1 *Vict. c. 55, s. 1—4*. See a list of the fees allowed, *ante*, pp. 23, 24.

*Alias and Pluries Writs.*] We have seen that the writ of capias is in force for one calendar month; see *ante*, p. 153; after which of course it cannot be executed. But it may be renewed by an *alias*, and that by a *pluries* writ; 2 *W. 4, c. 39, s. 10*; and such *alias* or *pluries* writs may issue into another county, if the plaintiff wish it, "referring to the preceding writ or writs, as directed to the sheriff to whom they were in fact directed." *R. G. M. 3 W. 4, s. 6*. It is not necessary to get the former writ returned, before you sue out an *alias* or *pluries*, unless where the *capias* has been issued for the purpose of saving the statute of limitations. *Gregory v. Des Anges*, 3 *Bing. N. C. 85*. Nor is it necessary that it should be sued out or tested on the day on which the former writ expired. *Nicholson v. Leman*, 2 *Dowl. 296*. See 2 *W. 4, c. 39, s. 10*. The *alias* cannot issue, however, before the expiration of the first writ; but there is no objection to a plaintiff having several writs against the same defendant, directed to the sheriffs of different counties, of the same or different dates, all running at the same time; such was the practice before the Uniformity of Process Act and the present Act, and these Acts have not altered the practice in this respect. *Dunn v. Harding*, 2 *Dowl. 803*. See *Bullock v. Morris*, 2 *Taunt. 67*. Where the *alias* or *pluries* writ is directed to the sheriff of the same county as the first *capias*, it is in this form:

*Victoria, by the grace of God, of the united kingdom of Great Britain and Ireland, Queen, defender of the faith, to the sheriff of ———, greeting: We command you, as before [or often] we have commanded you, that you omit not [&c. as in the ordinary writ.]* See 2 *W. 4, c. 39, sch. No. 4*.

But when directed to the sheriff of a different county, the *alias* and *pluries* are the same, and are in this form:

*Victoria, &c., to the sheriff of ———, greeting: We command you, as heretofore we have commanded the sheriff of ———, that you omit not [&c. as in the ordinary writ]* *R. G. M. 3 W. 4, s. 7*.

These writs are sued out in the same manner as the first

writ of capias, as directed, *ante*, p. 157. There is no necessity for a fresh affidavit to hold to bail or order, if the *alias* or *pluries* be sued out within the time expressed in the order.

*Defects in the writ.*] The court will not amend a capias; *Hodgkinson v. Hodgkinson*, 3 *New. & M.* 564, *per Tanston, J.* *Coleston v. Berens*, 3 *Dowl.* 253, *per Parke B.*; unless perhaps where the plaintiff would be otherwise barred of his action by the statute of limitations, or the like. *Per Parke B. MS. E.* 1834. *Partridge v. Welbank*, 5 *Dowl.* 93. Nor will they amend the copy, it being in the possession of the defendant. *Byfield v. Street*, 2 *Dowl.* 739. Also they will not amend either of the indorsements, the forms of which are given by stat. 2 *W.* 4, c. 39, sch. No. 4. See *Trotter v. Bass*, 1 *Bing. N. C.* 516.

But by R. G. M. 3 *W.* 4, s. 10, "if the plaintiff or his attorney shall omit to insert in or indorse on any writ or copy thereof, any of the matters required to be by him inserted therein or indorsed thereon, such writ or copy thereof shall not, on that account, be held void, but may be set aside as irregular, upon application to be made to the court out of which the same shall issue, or any judge." One consequence of this rule is, that applications to set aside the writ or copy for any defect or error in them, or to discharge the defendant or have the bail bond delivered up to be cancelled by reason of it, must, as in other cases of irregularity, be made within a reasonable time, and before the defendant has taken any fresh step after knowledge of the irregularity. See R. G. H. 2 *W.* 4, s. 33. Nineteen days from the time of the arrest has been deemed an unreasonable time; *Fowell v. Petre*, 1 *New. & P.* 227, and see *Rust v. Chine*, 3 *D.* 565; so, twenty three days, *Brashour v. Russel*, 6 *Dowl.* 185; so, from the 28th March to the 17th April, *Sugars v. Concanon*, 8 *Law J.* 159, *ex. 5 Mees. & W.* 30; six days have been deemed a reasonable time; *Smith v. Pennell*, 2 *Dowl.* 654; and it seems now to be considered that the application must be made before the time for putting in bail has expired. See *Tyler v. Green*, 3 *Dowl.* 439. *Edwards v. Collins*, 5 *Dowl.* 227. And this even in the case of a prisoner, unless the delay be accounted for. *Primrose v. Baddley*, 2 *Cr. & M.* 468. The application must be to set aside the writ or copy for irregularity, and not merely that the bail-bond be delivered up to be cancelled. *Yeates v. Chapman*, 3 *Bing. N. C.* 262.

*Application to discharge the defendant.*] Instead of giving bail, &c., the defendant, at any time after the arrest, may apply "to a judge of one of the superior courts at Westminster, or to the court in which the action shall have been commenced, for an order or rule on the plaintiff in such action to show cause why the person arrested should not be discharged out of custody; and that it shall be lawful for such judge or court to

make absolute or discharge such order or rule, and to direct the costs of the application to be paid by either party, or to make such other order therein as to such judge or court shall seem fit: Provided that any such order, made by a judge, may be discharged or varied by the court, on application made thereto by either party dissatisfied with such order." 1 & 2 *Vict. c. 110, s. 6, and see Hitchcock v. Hunter*, 10 *Law J. 87 qb.* And this application may be made at any time pending the suit, and is not limited to the time for putting in bail, as in the case of irregularity. *Walker v. Lumb*, 9 *Dowl. 131.*

It is probable also that, in cases where a defendant, instead of remaining in custody until this application shall be made, gives a bail-bond and is discharged, the court or a judge would order the bail-bond to be delivered up to be cancelled, upon the same grounds that they would have ordered him to be discharged if he had remained in custody. The case, though not within the words, is clearly within the equity of the statute.

For the purpose of making this application, an office copy should be obtained of the affidavit on which the order to hold to bail was made; and an affidavit should be made, answering and explaining the facts therein stated, stating (if practicable) any other facts showing that it was not the defendant's intention to quit England, and containing the positive oath of the defendant that such is not his intention, *Robinson v. Gardner*, 7 *Dowl. 716*, or that he was going for a temporary purpose merely, and not to reside. *Hitchcock v. Hunter*, 10 *Law J. 87 qb.*

If the application be made on the ground of the insufficiency of the affidavit, it should be to set aside the judge's order, and not the *capias*. *Hopkins v. Sal*, 8 *Law J. 255 ex.*; *S. C. nom. Hopkinson v. Salembier*, 7 *Dowl. 493*; *Hopkins v. Salembier*, 5 *Mees. & W. 423.*

#### SECTION VI.

##### *The Arrest.*

*Warrant.*] See as to the warrant, *ante*, p. 158. It must be delivered to the officer, before he can legally arrest the party. See *Hall v. Roche*, 8 *T. R. 187.* He must have it with him at the time he makes the arrest; See *Humphrey v. Mitchell*, 2 *Hodg. 72.* *Fownes v. Stokes*, 4 *Dowl. 125*; and must produce and show it to the party, at the time, if he require it. See *Robins v. Hender*, 3 *Dowl. 543*, 1 *Har. & W. 204.*

*Arrest.*] "The sheriff or other officer, to whom any writ of *capias* shall be directed, shall, within one calendar month after the date thereof, not including the day of such date, but not

afterwards, proceed to arrest the defendant thereupon." 1 & 2 Vict. c. 110, s. 4. Also, the writ must be executed before final judgment in the action. See *Id.* s. 5.

The sheriff, however, is bound to make the arrest as soon as he possibly can, after the writ has been delivered to him; he cannot delay the execution of it, merely because he is allowed by law a month from the teste of the writ for that purpose. *Brown v. Jarvis*, 1 Mees. & W. 704.

The arrest may be by actual caption of the party. Or if the officer say, "I arrest you," and the party acquiesce, or afterwards go with him, this is a good arrest; *Grainger v. Hill*, 4 Bing. N. C. 212; but if instead of acquiescing or going with the officer, the party were to escape, it would be otherwise. *Russen v. Lucas*, 1 Car. & P. 153. If the party be in his own dwelling-house, the officer cannot break open the outer door to arrest him; *Hopkins v. Nightingale*, 1 Esp. 99; but having obtained peaceable entrance at the outer door, he may break an inner door for that purpose. The officer, however, cannot justify the breaking of even an inner door of the house of a stranger, to search for and arrest the defendant, upon a suspicion that he is there; *Johnson v. Lee*, 6 Taunt. 246; at least, if he do, he does so at his peril: if he find him, he may be justified; if he do not, he is a trespasser. See *Lloyd v. Sandilands*, 2 Moore, 207. Besides arresting the party, the officer must also, upon or forthwith after such arrest, serve a copy of the writ upon the defendant. 2 W. 4, c. 39, s. 4. See *ante*, p. 157, 158. And the sheriff or other officer, to whom the writ is directed, shall, within six days after the execution of the writ, indorse upon it the true day of the execution thereof; otherwise he shall be liable, in a summary way, to make compensation for any damage arising from his neglect. *R. G. M.* 3 W. 4, s. 4.

The arrest must be made by the authority and direction of the bailiff to whom the warrant is directed: it need not, indeed, be his hand which actually makes the caption; nor is it necessary that it should take place in his presence; *Blatch v. Archer*, *Cowp.* 65; but he must be so far present as to be deemed acting in it; he cannot entirely leave the execution of it to any underling he may choose to depute for that purpose. See *Boyd v. Durand*, 2 Taunt. 161. *Housin v. Barrow*, 6 T. R. 122. If, at the instance of the plaintiff, the sheriff direct his warrant to a special bailiff, that is, to any person nominated by the plaintiff, who is not one of the sheriff's own officers, or even one of the sheriff's own officers, if the plaintiff appoint him specifically as the person who shall execute the writ, *Ford v. Leche*, 6 Ad. & El. 699. *Doe v. Trye*, 5 Bing. N. C. 573, the sheriff is not liable to the plaintiff for any thing which may occur in the execution of the writ; the plaintiff cannot even rule him to return the writ. But he is responsi-

arrest and after the defendant is  
*v. Richardson*, 8 T. R. 505.  
 executed within the balliwick of the  
 county; otherwise the court will dis-  
 charge him out of custody. *Hammond v. Taylor*,  
 in such a case, the application must be  
 made, and it must be proved that the arrest was not made upon the  
 authority of the county, and that there was no dispute as to the  
 authority. *Webster v. Manning*, 1 Dowl. 24. As to its exe-  
 cution, which, although parcel of one county, is  
 and surrounded by another, see *stat. 2 W. 4, c. 39*,  
*ante*, p. 152. It cannot be executed in the Queen's  
 Bench; *Winter v. Miles*, 10 East, 578; but it may, within  
 the verge of the palace, even without leave from the board of  
 green cloth. *Sparks v. Spink*, 7 Taunt. 311, and see *R. v.*  
*Stobbs*, 3 T. R. 735. And there is no objection to executing  
 it in the gaol of the county, &c., if the defendant be there  
 merely for his own purposes, and not a prisoner. *Loveitt v.*  
*Hill*, 4 Dowl. 579.

The arrest cannot be made on a Sunday. 29 C. 2, c. 7, s. 6.  
 and see *Atkinson v. Jameson*, 5 T. R. 25. Even where, by the  
 contrivance of the plaintiff's attorney, the defendant was ar-  
 rested on a Sunday upon a criminal charge, for the purpose of  
 effecting his arrest on the Monday on process in a civil action,  
 and on the Monday he was accordingly arrested at the plain-  
 tiff's suit in an action: the court ordered him to be discharged.  
*Wells v. Gurney*, 8 B. & C. 769, and see *Barrett v. Price*, 1  
 Dowl. 725. But it would be otherwise, if the arrest on the  
 criminal charge were not by, or in collusion with, the plaintiff.  
*Jacobs v. Jacobs*, 3 Dowl. 675. The arrest also cannot be  
 made after the writ has expired, that is to say, after one month  
 from the teste. See *Loveridge v. Plastow*, 2 H. Bl. 29. *Parrot*  
*v. Sh. of Kent*, 2 Esp. 585.

*Privilege from arrest.*] The permanent privilege from arrest  
 enjoyed by the royal family, peers and peeresses, members of  
 the house of commons, ambassadors and their servants, &c.,  
 has already been fully noticed, *ante*, p. 132, &c. We shall now  
 mention some cases of temporary privilege, where, under par-  
 ticular circumstances, if a party be arrested, the court upon  
 application will discharge him.

A clergyman is privileged from arrest, whilst going to church  
 to perform divine service, whilst performing it, and during  
 his return to his residence after performing it. *Goddard v.*  
*Harris*, 7 Bing. 320.

A practising barrister, *Lunthly v. Nathaniel*, 2 Dowl. 51, *Re*  
*Hippiseley*, 1 H. Bl. 636. *Anon.* 9 Law J. 176 *cp.* or attorney,  
*Strong v. Dickenson*, 5 Dowl. 86, is privileged from arrest in  
 court, on circuit and at sessions, and in going to and returning

from them. See *Strong v. Dickenson*, 1 Mees. & W. 488. *Bar-rack v. Newton*, 10 Law J. 182, qb. *Spencer v. Newton*, 6 Ad. & El. 623.

A bankrupt is privileged from arrest in going to surrender, and for forty-two days after he has surrendered, and for such further time as shall be allowed him by the commissioners for finishing his examination; if arrested, then, upon showing his summons to the officer, the latter shall discharge him out of custody, or shall be liable to pay him 5*l.* for every day he detains him. 6 G. 4, c. 16, s. 117, and see *Darby v. Baughan*, 5 T. R. 209. *Claughton v. Leigh*, 1 B. & C. 652. And he is privileged in the same manner, whilst attending the commissioners, upon notice, at any time after the last examination. *Arding v. Flower*, 8 T. R. 534.

A person attending any court of justice, or attending before the sheriff on the execution of a writ of inquiry, *Walters v. Rees*, 4 Moore, 34, or before commissioners of bankrupt, *Arding v. Flower*, 8 T. R. 534. *Selby v. Hills*, 8 Bing. 166, or the insolvent court, *Willingham v. Matthews*, 6 Taunt. 356, or before an arbitrator under a rule of court, *Spence v. Stuart*, 3 East, 89. *Randall v. Gurney*, 3 B. & A. 252, or the like, whether he attend as a party, *Childerton v. Barrett*, 11 East, 439. *Willingham v. Matthews*, *supra*. *Pitt v. Coombes*, 5 B. & Ad. 1078. *Sharplin v. Hunter*, 6 Dowl. 632, or as a witness, *Randall v. Gurney*, *supra*. *Ex p. Tilletson*, 1 Stark. 470, or as bail, *Rimmer v. Green*, 1 M. & S. 638. *Meekins v. Smith*, 1 H. Bl. 636, or the like, is privileged from arrest, whether compelled to attend by process, &c. or not. *Per Ld. Kenyon, C.J.* 8 T. R. 436. And he is also thus privileged, not only whilst he remains in court, &c., but also in going to and returning from it, if he be guilty of no unnecessary delay in doing so. *Randall v. Gurney*, 3 B. & A. 252. *Lightfoot v. Cameron*, 2 W. Bl. 113. *R. v. Priddle*, 1 Tidd. 198. *Anon.* 1 Smith, 355. *Pitt v. Coomes*, 5 B. & Ad. 1078, 3 Nev. & M. 212. *Strong v. Dickenson*, 1 Mees. & W. 488. *Spencer v. Newton*, 6 Ad. & El. 623. The application to discharge the party, in such a case, may be made either to the judge at nisi prius or court he was attending or going to attend, *Solomon v. Underhill*, 8 Camp. 229, or to the court which issued the process on which he was arrested; *Pitt v. Evans*, 2 Dowl. 223. *Walker v. Webb*, 3 Anst. 941. *Ricketts v. Gurney*, 7 Price, 699; but if he were arrested whilst attending or going to attend a writ of inquiry, the application should be made, not to the under-sheriff, but to the court in which the action is pending; *Walters v. Rees*, 4 Moore, 34; and where a person attending before commissioners of bankrupt, is arrested under process from an inferior court, the application, it should seem, must be to the court of Review. See *Kinder v. Williams*, 4 T. R. 377. It may be useful to add, that after a discharge from regular criminal process, a

party has no privilege *redeundo*; *Goodman v. London*, 2 Dowl. 504; 3 Nev. & M. 879; and the same, it should seem, as to civil process; but if discharged by reason of the process being irregular, or irregularly executed, he is privileged *redeundo*. *R. v. Blake*, 2 Nev. & M. 312.

*Taking to prison.*] Upon an arrest on mesne process, the defendant shall not be taken to prison within twenty-four hours, unless he refuse in the mean time to be taken to some safe and convenient dwelling-house, to be named by him, not being his own house; nor shall the officer carry him to any public-house or tavern, or to any house kept by himself. 32 G. 2, c. 28, s. 1. See *Simpson v. Renton*, 2 Nev. & M. 52, 5 B. & Ad. 35. *Evans v. Atkins*, 4 T. R. 555. *Pitt v. Sh. of Middlesex*, 1 Dowl. 201. *Dewhurst v. Pearson*, 1 Cr. & M. 365. *Barsham v. Bullock*, 10 Ad. & El. 23.

*Detainer.*] When a defendant is arrested upon a writ of *capias ad respondendum* or *capias ad satisfaciendum*, and any other writs of *capias* against him are in the hands of the same sheriff at the time of the arrest, or at any time during his detention, he is deemed by law to be arrested by the sheriff on all the writs, and the sheriff is accountable for his detention to the several plaintiffs at whose suits respectively the writs have been sued out. Hence the necessity of the practice of searching for detainers in the office of the under-sheriff, before a defendant arrested upon a *capias* is discharged out of custody, upon bail or otherwise.

If, however, a party be arrested, and there be then detainers against him in the office at the suit of the same plaintiff, and the arrest be decided to be unlawful, from any irregularity in the writ, or in the manner of executing it, or the like, the defendant, if ordered to be discharged from the first arrest, will be entitled to be discharged also as to the other detainers at the suit of same plaintiff. So, if the wrongful arrest be caused by the plaintiff or his attorney, though at the suit of another, for the purpose of lodging a detainer against the defendant or arresting him at the suit of the plaintiff, as soon as he should be in custody: in such a case, if the defendant be discharged as to the first arrest, he shall be discharged also at the suit of the plaintiff. And therefore where, by the contrivance of the plaintiff's attorney, the defendant was arrested on a Sunday upon a criminal charge, namely, an assault upon a third person, for the purpose of effecting his arrest in a civil action on the Monday, when he should be brought before the magistrate, and he was accordingly arrested on the Monday: the court ordered him to be discharged. *Wells v. Gurney*, 8 B. & C. 769. See *Jacobs v. Jacobs*, *post*, p. 167.

So, if the sheriff, by the illegal act of himself or his officer,



arrest a party, there he is not deemed to be in custody under any process, but is suffering a false imprisonment; which false imprisonment cannot operate as an arrest or detainer of the party under other writs against him which may then happen to be in the hands of the sheriff. Therefore, where the warrant on a *capias* against J. S. was given to the officer to whom it was directed, and the officer's assistant, in the absence of the officer, and not having the warrant with him, arrested J. S. and gave him in charge of a policeman for a pretended felony, in order to detain him until the officer should make a caption under the *capias*: the defendant, upon application to a judge, was discharged as to the *capias*; and the court afterwards held that as the sheriff or his officer was party to this illegal arrest, J. S. could not be detained upon a *ca. sa.* at the suit of another plaintiff, which happened to be in the sheriff's hands at the time of the first arrest. *Barratt v. Price*, 9 Bing. 570. So, where Sloman, a sheriff's officer, without warrant, arrested a defendant, against whom there were several writs in the sheriff's office; and having taken him to his lock-up house, Sloman then got a warrant made out to himself in one of the actions; but finding that this would not avail him, as being made after the arrest, he procured his name to be added by the undersheriff in a warrant upon another of these writs, which had already been issued to another officer, named Nathan: the question was, whether the defendant was entitled to be discharged in that action in which the warrant was made out to Sloman, and in that in which Sloman's name was added to the warrant, and as to the other writs then in the office against the defendant; and the actions being in different courts, applications were made to these courts respectively: the court of *Queen's Bench* held that he was entitled to be discharged as to the first action, because the arrest was without warrant, and as to the second, because Sloman was acting in the illegal arrest, and as to all the others, because by the arrest he was not in custody of the sheriff under any of the writs, but was falsely imprisoned by Sloman; but the court said that if Nathan, without collusion with Sloman, had under his warrant arrested the defendant whilst he was in the custody of Sloman, the arrest would have been good, and the defendant would then be rightfully in the custody of the sheriff in the other actions: *Collins v. Yewens*, 10 Ad. & El. 570, 8 Law J. 332 qb: the court of *Common Pleas*, in another of the actions, were of the same opinion: *Pearson et al. v. Yewans*, 5 Bing. N. C. 489, 8 Law J. 255 cp.: but the court of *Exchequer*, in another of the actions, upon an affidavit of the under-sheriff that at the time he added Sloman's name in the warrant he was not aware the defendant had been arrested, held that the detainers were all good; Sloman not having a warrant when he made the arrest, it was the act of a mere stranger, and the under-

sheriff adding Sloman's name in the warrant, did not make the sheriff a party to the illegal arrest, for the under-sheriff did not know at the time that the caption had been made; therefore the arrest under Nathan's warrant was good, and operated as a detainer of the defendant in all the other cases. *Robinson et al. v. Yewens*, 5 Mees. & W. 149, 8 Law J. 166 *ex.*

But where a person, having a *capias* in the sheriff's hands against a defendant, is not a party to the suit in which the defendant is illegally arrested, and does not collude with any party to it, and where the sheriff is no party to the illegal arrest, then such *capias* will operate as a detainer of the defendant, although he be discharged out of custody as to the action in which he has been illegally arrested. Therefore, where a sheriff's officer, without warrant, arrested a defendant at the suit of A., and A.'s attorney, perceiving the error, sent for the officer who had the warrant, and gave the defendant into his custody; this latter officer having also another warrant against him at the suit of B., lodged him in gaol charged with both actions: the court held that the defendant was entitled to be discharged in the action at the suit of A., but not in that at the suit of B. *Howson v. Walker*, and *Crowden v. Walker*, 2 W. Bl. 823. So, where a defendant was arrested at the suit of A., on an insufficient affidavit to hold to bail; and during his imprisonment B., another creditor, without collusion with A., lodged a detainer against him: the court discharged him as to the arrest at the suit of A., but held that he was not entitled to be discharged as to the action at the suit of B. *Barclay et al. v. Faber*, 2 B. & A. 743. So, where an arrest was set aside, on account of some previous arrangement between the parties, it was holden that a *ca. sa.* at the suit of another, which was at the time in the hands of the same sheriff, was a valid detainer, and that the defendant could not be discharged as to it. *Arundel v. Chitty*, 1 Dowl. 499. So, where a man was arrested on a Sunday, on a charge of forgery, and being brought before a magistrate on Monday was discharged; but upon leaving the police office, he was arrested in an action at the suit of one of his creditors; and there was an affidavit denying all collusion between the creditor and the person who preferred the charge of forgery: the court held that he was not entitled to be discharged. *Jacobs v. Jacobs*, 3 Dowl. 675. So, where a defendant was arrested upon a *ca. sa.*, and whilst in custody a detainer was lodged against him by another party; he was afterwards discharged as to the *ca. sa.* on the ground of irregularity; but the court held that he was still properly in custody as to the detainer. *Ex p. Cogg*, 6 Dowl. 461. The case of an arrest of a privileged person, is the only exception to this; there if he be arrested whilst privileged from arrest, as for instance, if a witness be arrested *redeundo*, he shall be discharged not only as to that action, but as to all other writs against

him then in the hands of the sheriff. *Spence v. Stuart*, 3 East, 89. Where a defendant, whilst privileged, was arrested at the suit of one of his creditors, and there were four other writs against him in the sheriff's hands at the same time, Tindal, C. J., made an order to discharge him out of custody as to the detainers as well as the writ on which he was arrested; he was afterwards arrested on a ca. sa. at the suit of another creditor, whilst he was not privileged, and by that time six other writs had been lodged with the same sheriff against him; he then applied to be discharged as to this ca. sa. on the ground that the plaintiff was dead at the time it was sued out, and he was discharged accordingly; but the court held that he was not entitled to be discharged as to the detainers, neither as to those in the sheriff's hands when he was formerly discharged, nor as to those lodged since. *Barrack v. Newton*, 10 Law J. 182 *qb*.

If there be detainers against a defendant arrested, and he be entitled to his discharge not only in the action in which he was arrested, but as to the detainers also, care must be taken that the rule or order be drawn up accordingly. See *Watson v. Carroll, et al.* 4 Mees. & W. 592. And in such a case the rule nisi or summons must be served upon the detaining creditors, as well as the creditors who caused the arrest, *Sharplin v. Hunter*, 6 Dowl. 632.

## SECTION VII.

*Bail Bond, &c.*

1. *Bail Bond.*
2. *Deposit with the Sheriff.*

1. *Bail Bond.*

The defendant, when arrested upon a *capias*, "shall remain in custody, until he shall have given a bail-bond to the sheriff, or shall have made deposit of the sum indorsed on such writ of *capias*, together with 10*l.* for costs, according to the present practice of the superior courts." 2 & 3 Vict. c. 110, s. 4. And the sheriff or other officer, to whom the *capias* is directed, is bound to discharge the party arrested under it, upon bail, if he tender sufficient sureties for that purpose. 23 H. 6, c. 9. See 2 *Saund.* 59, 59 a (3). 61 c (5). *Matson v. Booth*, 5 M. & S. 223. *Lovell v. Sh. of London*, 15 East, 320. *Evans v. Moseley*, 2 Cr. & M. 490. On the other hand, if he discharge him without taking a bail-bond, he must take care that bail above be afterwards put in within due time and perfected, see *Allingham v. Flower*, 2 B. & P. 246. *Pariente v. Plumtree*, 2 B. & P. 35,

or the defendant duly rendered, see *Brookhouse v. Sh. of Derbyshire*, 5 B. & C. 244, otherwise an action may be maintained against him for an escape; and the court will not relieve him by allowing him afterwards to put in and perfect bail, *Fuller v. Prest*, 7 T. R. 109. *Webb v. Matthew*, 1 B. & P. 225. *How v. Lacy*, 1 Taunt. 119, or to render the defendant, *Bird v. Bond*, 6 Taunt. 554, 2 Marsh. 261. *Vanderhaden v. Britten*, 4 D. & R. 155, or if an attachment be obtained against him, they will not set it aside. *R. v. Sh. of Surrey*, 7 T. R. 239. *R. v. Sh. of London*, 2 B. & A. 354. *Collins v. Smeggs*, 6 Moore, 111.

*The bond.*] The stat. 23 H. 6, c. 9, directs the sheriff to take "reasonable sureties of sufficient persons;" and therefore it is usual to require two sureties, with the defendant, to join in the bail bond. But there may be more. See *Matson v. Booth*, 5 M. & S. 223. Even if there be but one surety, the bond is not invalid on that account: 10 Co. 101 a: but the court do not favour it; and they will not set aside an attachment against the sheriff, at his instance, in a case where he has taken a bail bond with one surety only, *R. v. Sh. of London*, 2 Bing. 227, although they will, at the instance of the bail, *R. v. Sh. of Middlesex*, 2 Dowl. 140. *R. v. Sh. of Middlesex*, 7 Id. 313. The security must be by bond, 2 Saund. 596, and not by any undertaking or agreement not under seal. *Sedgworth v. Spicer*, 4 East, 568. *Lewis v. Knight*, 1 Dowl. 261. And see 2 Saund. 60. *Fuller v. Prest*, 7 T. R. 109. It must be given to the sheriff, as such, *Rogers v. Reeves*, 1 T. R. 422, in double the sum sworn to, see *Norden v. Horsley*, 2 Wils. 69, conditioned for the appearance of the defendant in the court out of which the process issued, *Jones v. Stordy*, 9 East, 55. *Renalds v. Smith*, 6 Taunt. 551. 2 Saund. 60 b., in eight days from the arrest, *Evans v. Mosely*, 2 Dowl. 364, to answer the plaintiff in a certain action, see 2 Saund. 60 a. *Owen v. Nail*, 6 T. R. 702, naming the parties correctly. *Holding v. Raphael*, 5 Nev. & M. 655, 1 Har. & W. 571. and see *Parker v. Bent*, 2 D. & R. 73.

*Forfeiture and assignment of it.*] By stat. 4 Ann. c. 16, s. 20, the sheriff shall, at the request and cost of the plaintiff, assign to him the bail bond, in the presence of two witnesses; after which the plaintiff may bring an action upon it in his own name. See *Philips v. Barlow*, 3 Dowl. 381. *Wright v. Barrett*, 5 Dowl. 64, 1 Bing. N. C. 433. And the witnesses must both be such as can prove it upon the trial; and therefore where the plaintiff in the action and another were the attesting witnesses to the assignment, it was holden that no action could be maintained upon the bond at the suit of the assignee. *White v. Barrack et al.* 1 Mees. & W. 424. This

assignment may be taken at any time, even before the bond is forfeited; or after forfeiture, and, since stat. 1 & 2 Vict. c. 110, after the plaintiff shall have taken a step or steps in the cause, as he may now proceed in the original action as well as against the bail, at the same time. *Betts v. Smith*, 10 *Lac. J.* 305 *qb.* But the plaintiff cannot take an assignment of the bail bond after the defendant is rendered, *Shaddocks v. Bullock*, 1 *B. & P.* 325, or after the cause is out of court, for default of the plaintiff's proceeding. *Sparrow v. Naylor*, 2 *W. Bl.* 876. *And see Pigott v. Truste*, 3 *B. & P.* 221. *Collett v. Bland*, 4 *Taunt.* 715. By taking the assignment, the plaintiff waives his right of ruling the sheriff to return the writ or bring in the body; *Ld. Brooke v. Stone*, 1 *Wils.* 223; or if he first proceed against the sheriff, he cannot afterwards bring an action on the bond, pending the rule to bring in the body. *R. G. H.* 2 *W. 4*, s. 23. *Whittle v. Oldacre*, 1 *B. & C.* 478. *See Blackford v. Hawkins*, 1 *Bing.* 181. *Pople v. Wyatt*, 15 *East*, 215.

The bond is forfeited, if the defendant do not put in bail on or before the eighth day from the time of the arrest, the day of the arrest being reckoned inclusive; 2 *W. 4*, c. 39, *sch. No. 4*; at any time after which, and before bail is actually put in, an action on the bond may be commenced. *Id. Hillary v. Rowles*, 5 *B. & Ad.* 460. Or if bail have been put in on or before the eighth day, and the plaintiff except to them, and the defendant fail to justify them within the time limited for that purpose by the practice of the court, the bond is then forfeited, and the sheriff or his assignee may thereupon commence an action upon it. *Bond v. Evans*, 4 *B. & C.* 864. *Bellis v. Mitford*, 2 *W. Bl.* 1009. *Wright v. Walker*, 3 *B. & P.* 564. Even if the bail justify, but the rule of allowance be not served in time, the plaintiff may commence his action upon the bail bond on the day after the time for justification has expired, and before the rule of allowance is served. *Bigbold v. Lee*, 1 *B. & C.* 285. But he cannot commence his action, that is, he cannot sue out a writ against the bail, until default has been made, as above mentioned, even although the writ be not served until after the bond is forfeited; *Alston v. Underhill*, 1 *Cr. & M.* 492. *See Edwards v. Danks*, 4 *Dowl.* 357; nor can he commence his action, after the bail have justified and the rule of allowance has been served, even although the bond was forfeited before justification; *Ellis v. Bates et al.* 2 *Cr. & M.* 143; nor after a judge's order giving the plaintiff judgment in the original action. *Isaac v. Ricardo*, 4 *Mees. & W.* 382.

*Action.]* If the action be by an assignee of the sheriff, it must be brought in the court which issued the process on which the bail bond was taken; *Chesterton v. Middlehurst*, 1 *Burr.* 642. *Walton v. Bent*, 3 *Wils.* 348, 2 *Saund.* 61 *a*; but if brought by the sheriff himself, it may be commenced in any

court. *R. G. H. 2 W. 4, s. 28.* The bond being joint and several, you may bring a joint action against all the parties, or separate actions against each; and it seems to have been decided that you may bring a joint action against two out of three parties to it. *Knowles v. Johnson, 2 Dowl. 653.* But as the bringing of separate actions against each party is deemed oppressive, you must take care not to do so, without sufficient cause; for otherwise, if the bail move to stay the proceedings on the bail bond, on payment of the debt, the court will oblige them to pay only the costs of one action, *R. G. H. 2 W. 4, s. 30, Key v. Hill, 2 B. & A. 598,* if the application be made within a reasonable time. *Johnson v. M'Donald, 2 Dowl. 44.*

The process is the ordinary writ of summons, "in debt on bail bond." It is not necessary to indorse the amount of the debt and costs upon it. *Rowland v. Dakeyne, 2 Dowl. 832. Smart v. Lovick, 3 Dowl. 34.* Get your declaration drawn by counsel or a pleader; and proceed in the action as in ordinary cases. If the defendant allow judgment to go by default, a writ of inquiry, or suggestion of breaches, will not be necessary; *Moody v. Pheasant, 2 B. & P. 446;* if the cause be tried, the verdict upon the general issue will be for the debt, namely the penalty in the bond, and one shilling damages, and the judgment will be accordingly. The bail are liable, not merely for the sum sworn to, but for the actual amount of the debt, and the costs in the original action, to the extent of the penalty, *Mitchell v. Gibbons, 1 H. Bl. 76. Orton v. Vincent, Cowp. 71. Savage v. West, Cowp. 71 cit. Stevenson v. Cameron, 8 T. R. 28. Heppel v. King, 7 T. R. 370,* notwithstanding (it should seem) the general rule of *H. 2, W. 4, s. 21,* mentioned *post* p. 201, which relates to bail above; for the penalty of the bail bond being the debt, the plaintiff has a right to recover to that extent for any damage he may have received from the breach of the condition. And although the execution must pursue the judgment, and be for the whole amount of the penalty and costs, yet if the debt and costs in the original action do not amount to the penalty, you must indorse your writ of execution, accordingly, to levy the amount only of such debt and costs, and the costs in the action on the bail bond. If the plaintiff take the bail in execution under a *ca. sa.* he cannot afterwards proceed in the original action against the principal. See *Allen v. Snow, 2 M. & S. 341.*

*Bail discharged, how.]* If the defendant die, before the plaintiff could have had judgment against him, the court will stay the proceedings on the bail bond, on payment of costs; but if he could have had judgment, the bail must pay the debt and costs in the original action also. *Orton v. Vincent, Cowp. 71.* If the principal become bankrupt and obtain his certificate

before the bond is forfeited, *Woolley v. Cobbe*, 1 Burr. 24. *Cockerill v. Owston*, *Id.* 436, or the bail become bankrupt and obtained their certificate after the bond is forfeited, *Coulson v. Hammond*, 2 B. & C. 626. *Slatter v. Scott*, 2 Cr. & M. 475, *S. C. nom. Streeter v. Scott*, 2 Dowl. 362, the court will stay the proceedings on the bail bond, without costs; but if the principal become bankrupt, &c. after the bond is forfeited, the bail cannot be relieved. *Id.* But if they do not pay the money until after the bankruptcy, they may sue the bankrupt for the amount, notwithstanding his certificate; for bail, not being sureties within the meaning of the bankrupt law, *Hewes v. Mott*, 6 Taunt. 329, cannot prove upon the estate, and therefore are not barred by the certificate. If the defendant be sent out of the country, under the Alien Act, before the bail bond becomes forfeited, the court, upon application, will stay any proceedings upon it, or perhaps order it to be delivered up to be cancelled. *See Postell v. Williams*, 7 T. R. 517. If the plaintiff take a cognovit from the defendant, and give him time for the payment of the debt and costs, he thereby discharges the bail, *Farmer v. Thorley*, 4 B. & A. 91, provided the time thus given defers the payment beyond the time at which the plaintiff could regularly obtain judgment. Formerly, if the defendant were rendered, and notice of render served before the return of the writ, the court would stay any proceedings upon the bail bond, or would deliver it up to be cancelled; *Jones v. Lander*, 6 T. R. 753. *Stamper v. Milbourne*, 7 T. R. 122. *Anon.* 2 Chit. 103; but it has been holden that, since the Uniformity of process Act, a render before the bail bond is forfeited, will not discharge the bail. *Hodgson v. Mee*, 5 Nev. & M. 302, *overruling Turner v. Brown*, 2 Dowl. 547. If the defendant be misnamed in the writ, the court will order the bail bond to be delivered up to be cancelled, unless the plaintiff shew that he used due diligence to ascertain the right name. *Ante*, *p.* So, if the affidavit to hold to bail be defective, the court will order the bail bond to be delivered up to be cancelled. *Ante*, *p.* If the writ be indorsed for a greater sum than that specified in the judge's order, the court will order the bail bond to be delivered up to be cancelled. *Semb. See Cook v. Cooper*, 7 Ad. & El. 605. And generally, in all cases in which the court will discharge a defendant for any irregularity in the capias, &c. they will in the like cases order the bail bond (if one have been executed) to be delivered up to be cancelled; provided the application be made within a reasonable time. *See Gurney v. Hopkinson*, 3 Dowl. 189. But the court will not set aside the proceedings upon the bail bond, merely because the defendant was not in fact arrested. *Call v. Thelwell*, 3 Dowl. 443. And they have refused to cancel it, on the ground that the defendant could not find the plaintiff, the affidavits not stating that the

defendant was unacquainted with him. *Brown v. Moore*, 4 Bing. 148.

*Regular proceedings set aside.*] By stat. 4 Ann. c. 16, s. 20, it is enacted that the court, in which an action is brought upon a bail bond by the assignee, may by rule "give such relief to the plaintiff and defendant in the original action, and to the bail upon the said bond or other security taken from such bail, as is agreeable to justice and reason; and that such rule or rules of the said court, shall have the nature and effect of a defeasance to such bail bond or other security for bail." If, therefore, the bail bond be forfeited, and an action brought upon it, the court will in general stay the proceedings upon payment of costs, and putting the plaintiff in the same situation as if no default had been made. See *Callan v. Tye*, 2 H. Bl. 235. And the court have done this, even after execution against the bail, and the money in the sheriff's hands. *Lepine v. Barrett*, 8 T. R. 222. In the first place, therefore, and before the application is made, bail must be put in and justified, *Heath v. Gurley*, 4 Moore, 149. *Boughton v. Chaffey*, 2 Wils. 6. *R. v. Sh. of Middlesex*, 2 Dowl. 116, or the defendant rendered. *Meysey v. Carnell*, 5 T. R. 534. *R. v. Sh. of Middlesex*, 4 Dowl. 673. *R. v. Sh. of Lincolnshire*, 4 Dowl. 455. Then, if the plaintiff have not lost a trial by the default of the defendant in not putting in and perfecting his bail, the proceedings upon the bail bond will be stayed upon payment of costs, the court also sometimes imposing other terms, such as taking short notice of trial or the like, if the application be made on behalf of the defendant, See *Call v. Thekwell*, 3 Dowl. 445, but not if made on behalf of the bail. *Gale et al. v. Hayworth*, 6 Dowl. 323. But if the plaintiff have lost a trial, the court also require that the bail bond shall stand as a security. *Vide infra*. Also, if more than one action be brought upon the bail bond, "proceedings may be stayed on payment of the costs in one action, unless sufficient reason be shewn for proceeding in more," *R. G. H. 2 W. 4, s. 30*, if the application be made within a reasonable time. *Johnson v. Macdonald*, 2 Dowl. 44.

By R. M. 59 G. 3, K. B. it is ordered that "no rule shall be drawn up for setting aside an attachment, regularly obtained against a sheriff, for not bringing in the body, or for staying proceedings regularly commenced on the assignment of any bail bond, unless the application for such rule shall, if made on the part of the original defendant, be grounded on an affidavit of merits, or if made on the part of the sheriff or bail, or any officer of the sheriff, be grounded on an affidavit, shewing that such application is really and truly made on the part of the sheriff, or bail, or officer of the sheriff, as the case may be, at his or their own expense, and for his or their indemnity



only,\* and without collusion with the original defendant." There is a recent rule of the Exchequer, R. H. 7 W. 4, in exactly the same words. 5 Dowl. 446. See *R. v. Sh. of Cheshire*, 6 Dowl. 709. Where the words were "own indemnity," instead of "indemnity only," the affidavit was holden bad; but the court gave leave to amend and re-swear it. *Call v. Thelwell*, 1 Cr. M. & R. 780. So, where it omitted to state at whose expense the application was made, it was holden insufficient. *R. v. Sh. of Surrey*, 3 Dowl. 174. But in an affidavit of merits, it is not necessary to state on whose behalf, or at whose expense, the motion is made. *Bell v. Taylor*, 1 Chit. 572. It must state, however, that the defendant has a good defence to the original action "upon the merits;" where these latter words were omitted, the court held the affidavit insufficient. *Grottick v. Bayley*, 5 B. & A. 703. and see *ante*, p. 13. In the court of Common Pleas there is no rule upon the subject; but the same practice prevails there as in the Queen's Bench. See *R. v. Sh. of London*, 4 Bing. 437. In the Queen's Bench and Exchequer, the affidavit may be intituled either in the action on the bond or in the original cause; in the Common Pleas, it must be intituled in the action on the bond. See *post tit. "Affidavit;"* and see the forms of the affidavit required in this case, in the Appendix. There is no objection to this affidavit being made by one of the bail, if the application be made on the behalf of him alone. *R. v. Sh. of Middlesex*, 3 Dowl. 186. and see *Stride v. Hill*, 1 Gale, 431.

*Bail bond standing as a security.*] Formerly, upon staying proceedings either upon an attachment against the sheriff for not bringing in the body, or upon the bail bond, the attachment or bail bond would be ordered to stand as a security, if the plaintiff had declared *de bene esse*, and had been prevented, for want of special bail being perfected in due time, from entering his cause for trial, in a town cause, in the term after that in which the writ was returnable, and in a country cause, at the ensuing assizes. But this rule of court seems to be abrogated, and the practice superseded, by stat. 1 & 2 Vict. c. 110; for now a plaintiff can no longer declare *de bene esse*,

\* In the copy of this rule, given in 2 B. & A. 240, the words are "their only indemnity," and in a former edition of this work, where I copied this rule from the Report, conceiving it to be correct, as the court of Queen's Bench had always used it, and decided according to it, I remarked that there was a difference between it and the rule in the Exchequer, the words in the one being "only indemnity," and in the other "indemnity only." It is not very clear, however, even now, that the copy of the rule in 2 B. & A. 240, is erroneous; the original rule is lost, and it is but a copy which is now in the Rule office; and whether the error be in this latter copy, or in the Report, is a matter of some doubt.

(*ante*, p. ) and he can no longer be prevented from entering his cause for trial for want of special bail being perfected in due time. See *ante*, p. .

## 2. Deposit with the Sheriff.

The defendant, instead of giving a bail bond, may deposit with the sheriff or officer the amount of the debt indorsed on the process, with £10 to answer costs; and he shall thereupon be discharged as to that action; 43 G. 3, c. 46, s. 2; and which money the sheriff must pay into court. *Id.* Neither the sheriff, nor the officer of the court to whom the money is paid, is entitled to poundage upon it. *Stewart v. Bracebridge*, 2 B. & A. 770. *Hunn v. Brine*, 6 Moore, 124.

If the defendant afterwards put in and perfect special bail in due time, 43 G. 3, c. 46, s. 2, or render himself in discharge of his bail, *Chadwick v. Battye*, 3 M. & S. 283. *Anon.* 1 Chit. 145. *Harford v. Harris*, 4 Taunt. 669. and see *Hill v. Ching*, 1 Bing. 103, he may have the money out upon motion. The rule for this purpose is a rule to shew cause, founded upon an affidavit of the facts; which is afterwards made absolute in the ordinary way. Where a third party deposited the money for the defendant, the court of King's Bench allowed it to be paid out to such party, upon bail being put in and perfected; *Nunn v. Powell*, 1 Smith, 13; but the court of Common Pleas have refused to do this, even although the defendant had become bankrupt, as they held that they were not authorized by the statute to order it to be paid to any other person than the defendant. *Edelsten v. Adams*, 8 Taunt. 557. Where a defendant, after making such deposit, wishing to settle the action, gave notice to the plaintiff's attorney that he should claim no more of it than the excess of the £10 above the costs actually incurred, the court held that the plaintiff could not afterwards proceed in the action. *Clarke v. Yeates*, 3 Brod. & B. 273. But where no such notice is given, the presumption is that the money is deposited and paid in under the statute. *Wain v. Bradbury*, 1 Smith, 128. If the defendant perfect bail or render, but not within the time limited for that purpose by the practice of the court, the court will not allow him to take the money out, without an affidavit of merits. *Newman v. Hodgson*, 2 B. & Ad. 422.

But if the defendant do not perfect bail [or render] in due time, then the money so deposited and paid into court, shall be paid to the plaintiff. 43 G. 3, c. 46, s. 2. The rule for this purpose is a rule to shew cause, founded upon an affidavit of the facts; which is afterwards made absolute in the ordinary way.

## SECTION VIII.

## Bail.

1. *Special Bail in Town Causes.*
2. *Country Bail.*
3. *Bail by Prisoners.*
4. *Deposit in lieu of Special Bail.*
5. *Proceedings against Bail.*
6. *In what cases Bail discharged.*
7. *Render in discharge of Bail.*

1. *Special Bail in Town Causes.*

By stat. 1 & 2 Vict. c. 110, which regulates the cases in which a defendant may now be arrested upon a *capias*, it is enacted that "all subsequent proceedings, as to putting in and perfecting special bail, or of making deposit and payment of money into court, instead of putting in and perfecting special bail, shall be according to the present practice of the superior courts, or as near thereto as the circumstances of the case will admit." *Id.* s. 4.

*Putting in.*] Bail must be put in, on or before the eighth day from the time of the arrest, the day of the arrest being reckoned inclusive; 2 *W.* 4, c. 39, *sch.* No. 4; otherwise the plaintiff may proceed against the sheriff or upon the bail bond. *Id.* *Warn.* 3. *Hillary v. Rowles*, 2 *Dowl.* 201. Even in the case of country bail, since the Uniformity of Process Act, not only must the recognizance be taken, but the bail piece must be transmitted, and notice of bail given, on or before the eighth day; otherwise the plaintiff may take an assignment of and proceed upon the bail bond. *Grant v. Gibbs*, 3 *Dowl.* 409, 1 *Hodg.* 56. Where the arrest was on the 1st April, and the 8th & 9th being Easter monday and tuesday, the court held that the defendant had the whole of Wednesday to put in bail, and set aside a writ in an action upon the bail bond sued out on the 10th, although not served until the 11th. *Alston v. Underhill*, 1 *Cr. & M.* 492. If bail be not put in in time, then, if a bail bond have been taken, the plaintiff may take an assignment of it, and commence an action upon it, on the ninth day; *Hillary v. Rowles*, 2 *Dowl.* 210; or if a sum have been deposited with the sheriff instead of a bail bond, the plaintiff may proceed to take it out of Court; *Ante*, p. 176; or if neither bail bond be given, or deposit made, and the defendant be at large, the plaintiff may bring an action against the sheriff for an escape. See *Fuller v. Prest*, 7 *T. R.* 109. But although, in order to avoid these consequences, bail must be put in within the time above mentioned, yet it may be put in after it, as for

the purpose of setting aside proceedings against the sheriff or upon the bail bond, *See ante*, p. 173, or the like. And if the plaintiff will not proceed upon the bail bond, but against the sheriff merely, it will be sufficient to put in bail at any time before the expiration of the rule to return the writ. It will be dangerous, however, to depend upon this; as the plaintiff, after ruling the sheriff to return the writ, may abandon his rule and take an assignment of the bail bond. By a rule of the court of Exchequer, however, if the plaintiff rule the sheriff to bring in the body, the defendant shall be at liberty to put in and perfect bail at any time before the expiration of the rule. *R. Ex. M. 1 W. 4, s. 15.*

Bail may be put in by the defendant or his attorney; or by the sheriff or his officer; *R. v. Sh. of London*, 2 B. & A. 604. *Evans v. Sweet*, 2 Bing. 271. *Hopkins v. Peacock*, 5 Price, 558. and see *Taylor v. Evans*, 1 Bing. 367; or by an attorney, in pursuance of any undertaking he may have given to that effect. And if two sets of bail be put in, the plaintiff cannot treat either set as a nullity, but must except to both, if he would prevent their allowance. *Gilmour v. Brindley*, 7 D. & R. 259.

Two persons must be put in as bail. And by R. G. H. 2 W. 4, s. 18, "notice of more bail than two, shall be deemed irregular, unless by order of the court or a judge." Care must be taken that neither of them be a "practising attorney or clerk to a practising attorney," otherwise "the plaintiff may treat the bail as a nullity, and sue upon the bail bond as soon as the time for putting in bail has expired, unless good bail be duly put in in the meantime." *R. G. H. 2 W. 4, s. 13.* As to the other objections which may be made to the bail, when they come to justify, see *post*, p. 190, &c. Each of the bail must be a housekeeper, *Slade's bail*, 1 Chit. 502; *Bold's bail*, 1 Chit. 288. and see *Saggers v. Gordon*, 5 Taunt. 174, or freeholder: see *Tomsey v. Napier*, 8 Taunt. 148: a copyholder, *Anon.* 2 Chit. 97, or a leaseholder, *Smith's bail*, 1 Dowl. 1, who is not a housekeeper or freeholder, cannot be bail, unless by consent; and where a person was put in as bail, who, although a housekeeper in Scotland, was neither a housekeeper nor freeholder in this country, but merely lived here in lodgings, *Patteson, J.* rejected him on this ground. *Anon.* 1 Dowl. 61. *S. P. Hughes v. Stirling*, 11 Price, 158. But where it appeared that the bail, although he himself lived in lodgings, paid his share of the rent and taxes of a house, occupied by his partner in trade, and where they jointly carried on their business, the court of Common Pleas held that he was a housekeeper, and was competent to justify as bail. *Savage v. Hall*, 1 Bing. 440.

For the purpose of putting in bail, get a blank bail piece at the stationer's, and fill it up from the copy of the capias served at

the time of the arrest. Then take the bail with you to a judge's chambers, and the judge's clerk will take their recognizance, the bail signing the bail piece; leave the bail piece at the judge's chambers. Or if you have given notice of putting in and justifying bail at the same time, as shall be hereafter mentioned, or in case bail are added by a judge's order, the bail may be put in with the judge's clerk at Westminster, on the morning they attend to justify. Where the copy of the capias served at the time of the arrest, by mistake required the defendant to put in bail in the Exchequer instead of the Common Pleas, his omission to put in bail in the Common Pleas was holden to be no ground for attaching the sheriff for not bringing in the body. *Mayhew v. Hoadby*, 6 Dowl. 629. The county in the margin of the bail piece, must be that in which the arrest took place; see *Smith v. Miller*, 7 T. R. 96; even where the arrest is "upon an alias or pluries writ issued into another county, pursuant to the rule, M. 3 W. 4, s. 6, the defendant must put in bail in the county where he was arrested." *R. G. M. 4, W. 4, r. 1*. The bail piece must be rightly intituled in the court; *Hall's bail*, 1 Chit. 79; and must correspond with the writ in the names of the parties, *Anon.* 1 Moore, 126; *Holt. v. Frank*, 1 M. & S. 199, and in the sum indorsed on it. Even where a defendant, sued by a wrong name, put in and perfected bail by his right name, but without identifying himself as the person sued by the other name: it was holden that the plaintiff might treat the bail as a nullity, and attach the sheriff. *R. v. Sh. of Suffolk*, 4 Taunt, 818. It may perhaps be necessary to mention, that the defendant cannot join in the recognizance; the recognizance is entered into by the bail only, and in double the sum sworn to. *R. E. 36, G. 3. C. P.*

By stat. 1 & 2 Vict. c. 45, s. 4, 5, the judges of the courts of Common Law at Westminster are empowered to appoint commissioners, not being attornies, before whom bail may be put in and justified in vacation. I am not aware, however, that this has as yet been done.

*Notice of bail.*] Notice of bail must be given in all cases; and bail shall not be deemed to be put in, until this notice is given. *R. E. 49 G. 3, C. P.*; *R. M. 16, C. 2, K. B.* It may be given in three different ways: 1st. a notice that bail have been put in; which is usually given where bail have been put in in due time: 2dly. the like notice, accompanied with an affidavit of the sufficiency of the bail: and 3dly. a notice that the bail will be put in at a certain time and place, and that they will at the same time justify themselves; which is usually given where bail have not been put in in due time.

1. As to the ordinary notice: it must be correctly intituled in the court. It must be correctly intituled in the cause. See *Anon.* 2 Chit. 77, 81. It must state before what judge

the bail was put in; and if in fact they were put in before a different judge from the one stated, the notice will be bad. *Kelly v. Wrother*, 2 Chit. 109. *Crawford v. Oxley*, 3 Smith, 515. It must state the names of the bail correctly: where the Christian name was written Frances for Francis, it was holden bad; *Anon.* 1 Moore, 126; even where the initial merely of one of two Christian names of a bail was given, Coleridge, J. intimated that the notice was bad on that account, but allowed the bail to justify, on the defendant paying the costs of the opposition. *White's bail*, 2 Har. & W. 134. Where, however, in the hurry of writing the notice, the names of the bail were altogether omitted, the court held that the plaintiff could not on that account treat the notice as a nullity, and proceed against the sheriff. *Pugh v. Emery*, 4 D. & R. 30. The notice must also give the additions of degree or mystery of the bail, or other sufficient description of them. — *v. Costar*, 5 Taunt. 554. Where the bail was described as a "manufacturer," Taunton, J. held it to be too general, and bad. *Fearnley's bail*, 1 Dowl. 40. Where a schoolmaster was described as a gentleman, it was holden sufficient; — *v. Pasman*, 5 Taunt. 759; and the same, as to a clerk in the Custom House, *Anon.* 1 Chit. 492, n. and a clerk in the Post Office. *Wood v. Ray*, 2 Dowl. 692. But where a clerk in a mercantile house was described as a gentleman, the bail were rejected. *Moss v. Heavyside*, 7 D. & R. 772. So where one of the bail was described as a gentleman, and upon examination it appeared that he carried on the business of an agent for the sale of Scotch ale, Gurney, B. held this to be a substantial misdescription, and rejected the bail. *Flemming's bail*, 1 Cr. & M. 111. So where both the bail were described as gentlemen, and one was a clerk to the defendant's attorney, and the other a porter, watchman and shoeblick, the court held that the plaintiff was warranted in treating the notice of bail as a nullity, and suing on the bail bond. *Fenton v. Ruggles*, 1 B. & P. 356. So where bail were described as jewellers, and they were in fact but clerks to a jeweller, Littledale, J. held this to be a misdescription, but gave time to give a fresh notice. *Hamlet's bail*, 1 Dowl. 501. Notice for J. M. as bail, has been holden not to be a good notice for J. M. the younger. *Smith v. Mellon*, 5 Taunt. 854.

And by R. G. T. 1 W. 4, s. 2, "every notice of bail shall, in addition to the descriptions of the bail, mention the street or place, and number (if any), where each of the bail resides, and all the streets or places, and numbers (if any), in which each of them has been resident at any time within the last six months, and whether he is a housekeeper or freeholder." As to this clause about the six months' residence, it was at first holden not to be necessary to state it, if in fact the bail had resided at the places mentioned in the notice during the

previous six months. *Fenton v. Warre*, 2 Tyr. 158. *Anon.* 1 Dowl. 160. But the opinion of all the judges has since been taken upon the point, and they have holden that it ought to be inserted. *Per Vaughan*, B. 2 Tyr. 592, n. and see *Holling's bail*, 5 Dowl. 220. *Park's bail*, 2 Har. & W. 134. And where the notice was defective in this respect, the court would not allow the bail to justify, even although they were not opposed; but they gave leave to amend. *Sywood and Dogherty's bail*, 3 Dowl. 116. Where the notice stated that the bail had resided "within the last six months" at the place therein mentioned, this was holden bad; but as the notice was accompanied by an affidavit, which stated that the bail had resided there for the last six months, the court held that it remedied the defect. *Ward's bail*, 1 Cr. & M. 28. As to the description of the bail, the meaning of the rule is, that if they live in a street, the street must be named; see *Hanwell's bail*, 3 Dowl. 425; if their house be numbered, the number must be stated; *vide supra*; but if there be neither number nor street, then the residence must be described with such convenient certainty as to enable the plaintiff to make the requisite enquiries as to the solvency of the bail. See *Langyon's bail*, 3 Dowl. 85. *Treasure's bail*, 2 Dowl. 670. *Smith's bail*, 1 Dowl. 499. If the bail have two places of residence, it will be sufficient to state one of them. *Anon.* 1 Dowl. 159. *Fortescue's bail*, 2 Dowl. 541. But where one of the bail was described of Streatham, where he had a house, but it appeared that for the last three months he resided at a lodging in the Strand, Taunton, J. held the description to be bad, and that he ought to have been described of the place where he actually resided. *Thompson v. Smith*, 1 Dowl. 340. Where the number of the house was omitted, but it appeared the bail had been found, and they were not opposed upon any other ground, Bayley, B. allowed them to justify, on paying the costs of the opposition. *Muir v. Smith*, 2 Tyr. 742. Where the notice omitted to state that the bail were housekeepers or freeholders, Taunton, J. held it bad, although accompanied by an affidavit in which the fact was stated. *Anon.* 1 Dowl. 160. And where the notice described bail as a housekeeper, and he was in fact a freeholder but not a housekeeper, Littledale, J. held it to be bad, and rejected the bail. *Wilson's bail*, 2 Dowl. 431. So in all cases where a false description is given, the notice will be bad. *Anon.* 1 Chit. 493. Where the notice, however, was only defective in the description, as omitting the number of the house, and the plaintiff, instead of taking the objection upon the motion to justify, obtained time to enquire into the sufficiency of the bail, Patteson, J. held that it was too late for him afterwards to object to the notice for the defect, particularly as it was not denied that he had found the bail. *Foster's bail*, 2 Dowl. 586. It is no longer necessary, in the

Exchequer, to state in the notice that the bail piece is filed with the filacer. *Wigley v. Edwards*, 2 Cr. & M. 320. See the form of this notice in the Appendix :—

Where bail above was put in by an attorney for the bail to the sheriff, and notice of the bail was given by the defendant's attorney, the court held it sufficient, as an order to change the attorney was not necessary in such a case. *R. v. Sh. of London*, 2 B. & A. 604.

2. By R. G. T. 1 IV. 4, s. 3, if the notice of bail shall be accompanied by "an affidavit of each of the bail, according to the form hereto subjoined, and if the plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification; and if such bail are rejected, the defendant shall pay the costs of opposition, unless the court, or a judge thereof, shall otherwise order." The form of the affidavit is given by the rule, and is set out in the Appendix. This affidavit, as all others, must state the deponent's addition, *Brown's bail*, 5 Dowl. 220. *Morgan v. Stone*, 1 Gale, 15, although the form given in the rule omits it.

As the intention of this affidavit is, that the plaintiff may have an opportunity and the means of ascertaining, by enquiry, whether the bail be really possessed of the property described in it, so that if he be satisfied of the truth of the affidavit, he may not give the bail the trouble of attending personally to justify: the property must be described with that certainty, which will enable the plaintiff to make those enquiries; otherwise the court will not deem it an affidavit within the meaning of the rule. And therefore where the affidavit stated that the bail had a certain sum of money in the funds, without saying in what stock, Parke, J. held it to be insufficient. *Anon.* 1 Dowl. 159. So, where it omitted to state where the property was situate, and stated several kinds of property and but one sum as the value of all collectively, it was holden bad. *Hodgson v. Cooper*, 2 Cr. M. & R. 43. But where the affidavit was, that the deponent was possessed of property to the amount of 100*l.* "over and all above his just debts," and that it consisted of a freehold house, situate, &c. without stating the value of the house, it was holden sufficient: the words "over and all above," were the same in substance as "over and above all;" and as only one property was described, and the affidavit had previously stated the deponent to be worth 100*l.* after payment of his debts, it was equivalent to stating that the freehold house was worth a sum at least equal to the 100*l.* and the debts together; but that if several properties had been described, it would have been otherwise. *Boyd's bail*, 1 Hodg. 93, but see *Willer's bail*, 6 Dowl. 312. The court, however, in general insist upon a strict compliance with the form given in the rule; and where the affidavit stated the bail to be worth a certain sum "above all their just debts," the



words in the rule being "over and above what would pay all their just debts," the court held it to be insufficient. *Stevens v. Miller*, 2 Mees. & W. 368. If the bail fail to justify by reason of the property stated in the affidavit, but it appears that they have other property sufficient for the purpose, the court will allow them to justify, and the costs of the opposition will be costs in the cause. *Brown v. Ahrenfeldt*, 7 Dowl. 46. Also, if the affidavit omit any material part of the above form, as for instance, that the bail are housekeepers or freeholders, *Anon.* 1 Dowl. 127, or the like, it cannot be used as an affidavit within the above rule, if the plaintiff object to it on that ground. *Martin v. Gell*, 2 Tyr. 166. see *Smith's bail*, 1 Dowl. 514. Even where the affidavit stated the deponent to be a housekeeper at S. but did not state that he resided there, it was holden insufficient. *Heald's bail*, 3 Dowl. 423. The only effect, however, of an omission or defect in the affidavit, will be, that the defendant will not be allowed his costs of justification; it is no objection to the bail justifying. *Shave v. Spode*, 2 Mees. & W. 42. *Stevens v. Miller*, *Id.* 368. *Brown v. Ahrenfeldt*, 7 Dowl. 46. *Popjoy's bail*, 1 Cr. M. & R. 594, nor does it entitle the plaintiff to the costs of opposing the bail. *Brown v. Ahrenfeldt*, 4 Mees. & W. 76. Where the affidavit stated that the bail were not security for any person "except the above defendant," instead of stating that they were not bail for any defendant "except in this action," the court allowed it to be amended, neither party paying costs. *Warrow v. De Burgh*, 7 Dowl. 96. *De Bode's bail*, 1 Dowl. 368. See *Anon.* *Id.* 126. Although the form given in the above rule is by one bail only, there is no objection to its being a joint affidavit by both. *Anon.* 1 Dowl. 115.

The notice of bail, served with this affidavit, may be either a notice of bail having been put in, as mentioned *ante*, p. 179, or, it seems, a four days' notice of putting in and justifying bail, which shall be mentioned presently. See *Bowman v. Russell*, 2 Tyr. 744. And either the original affidavit may be annexed to the notice at the time it is served, or the original may be filed and a copy annexed. Where a copy, however, was annexed, but it did not appear to be so on the face of it, nor was it stated where the original was filed, the court held that the plaintiff was not liable to the costs of justification, on the bail being allowed. *West v. Williams*, 3 B. & Ad. 345.

As to costs: if the bail be allowed, the plaintiff will be ordered to pay the costs of justification, whether he have opposed them or not; *Johnson's bail*, 1 Dowl. 514; if they be rejected, the defendant must pay the costs of opposition, unless the judge order to the contrary; *ante* p. 181; and the judge seldom interferes in this respect. See *Evan's bail*, 1 Dowl. 384.

It may be necessary to mention that the rule we have been

now discussing, does not extend to the case of a prisoner, *Webb's bail*, 1 Dowl. 446, or to any case where the plaintiff is not bound to except to the bail. *Per Patteson, J. Id.* But it applies to country bail; *Grant's bail*, 1 Cr. M. & R. 598; and where in the case of country bail, an affidavit, intended to be in conformity with the above rule, was delivered with the notice of bail, and the affidavit turned out to be defective, the bail were rejected, although the affidavit would have been good as an affidavit of justification, independently of this rule. *Penson's bail*, 4 Dowl. 627, 1 Har. & W. 663. *Weller's bail*, 6 Dowl. 312.

3. By R. G. T. 1 W. 4, s. 1, "a defendant may justify bail, at the same time they are put in, upon giving four days' notice for that purpose before eleven o'clock in the morning, and exclusive of Sunday; and if the plaintiff is desirous of time to enquire after the bail, and shall give one day's notice thereof as aforesaid to the defendant, his attorney or agent, as the case may be, before the time appointed for justification, stating therein what further time is required, such time not to exceed three days in the case of town bail, and six days in the case of country bail, then (unless the court or a judge shall otherwise order) the time for putting in and justifying bail shall be postponed accordingly, and all proceedings shall be stayed in the mean time." See *Jenkins v. Maltby*, 2 Crompt. & J. 124. See the form of the notice in this case, in the Appendix.

This rule of court does not extend to the case of a prisoner; *Davis v. Grey*, 2 Tyr. 276. *King's bail*, 1 Dowl. 509; before this rule, prisoners were allowed, by the practice of all the courts, to give a two days' notice of putting in and justifying bail, and such is still the practice. Nor does the rule extend to added bail; *Key v. Mac Kynaire*, 5 Dowl. 453; or to any other case, where the notice is not for the putting in and justifying bail at the same time. *Jones's bail*, 2 Dowl. 159.

If there be any omission or other defect in the notice of bail, the plaintiff cannot on that account treat it as a nullity, and proceed against the sheriff or upon the bail bond, but must object to it, if at all, when the bail attend to justify. *Pugh v. Emery*, 4 D. & R. 30. *Bell v. Foster*, 8 Bing. 334. 1 Dowl. 271. *R. v. Sh. of Middlesex*, 1 Cr. & M. 482. *Foster's bail*, 2 Dowl. 586.

*Exception and notice.*] Where bail are put in in due time, that is to say, on or before the eighth day inclusive after the arrest, (*vide ante*, p. 177,) the plaintiff must except to them, if he would compel a justification. *R. v. Sh. of Middlesex*, 5 B. & C. 389. *Rogers v. Mapleback*, 1 H. Bl. 106. Even where a

sheriff's officer is put in as bail, or any other person, who, by the practice of the court, will not be allowed to justify, the plaintiff cannot treat the bail as a nullity, but must except to them, and then make his objection when they come up to justify. *Banks v. Levi*, 1 Chit. 713. The only exception to this is, where an attorney or an attorney's clerk has been put in as bail; there, we have seen (*ante* p. 178), that the plaintiff may treat the bail as a nullity, and proceed upon the bail bond or against the sheriff. By R. G. H. 2 W. 4, s. 15, "where bail to the sheriff become bail to the action, the plaintiff may except to them, though he has taken an assignment of the bail bond." The exception is entered in the bail book at the judge's chambers: *I except against these bail; A. P. plaintiff's attorney.* This is usually done as soon as practicable after you know of the bail being put in; but it must be done, if at all, within twenty days after the service of the notice of bail, R. M. 8 Ann. K. B., after which the bail are deemed perfected, and you cannot compel a justification. Also, if bail are put in and notice given, before the sheriff is ruled to bring in the body, the plaintiff must except to the bail, before he can rule the sheriff, otherwise his proceeding will be irregular. *R. v. Sh. of Middlesex*, 7 D. & R. 264. *R. v. Sh. of Middlesex*, 8 T. R. 258. And if two sets of bail be put in, he must except to both, otherwise the set not excepted to would in twenty days become absolute; and where in such a case, he treated one set of bail as a nullity, excepted to the other, and because that other failed to justify, he proceeded to attach the sheriff, the court set aside the attachment for irregularity. *Gilmour v. Brindley*, 7 D. & R. 259. Want of exception or notice, is waived, as between the parties, by the defendant giving notice of justification; *Hanwell's bail*, 3 Dowl. 425. *Anon.* 1 Chit. 174; but this is no waiver of the irregularity, as between the plaintiff and the sheriff. *Rogers v. Mapleback*, 1 H. Bl. 106.

It is only where bail have been put in, in due time, however, that an exception is necessary; if put in after the eighth day inclusive, as above mentioned, the defendant must justify them at his peril, whether they be excepted to or not, nor will the lapse of twenty days in that case have any effect in perfecting them. *Nunn v. Rogers*, 2 Chit. 108. *Story's case*, *Id.* 82. *R. v. Sh. of Middlesex*, 7 Dowl. 82, 8 Law J. 71 *ex.*

After entering the exception, you must give notice of it to the defendant's attorney; for the exception is not deemed complete until this notice is given. *Oldham v. Burrell*, 7 T. R. 26. And the notice should be in writing; a mere verbal notice is an irregularity, which probably may be waived, as between the parties, by the defendant giving notice of justification; but to enable the plaintiff to proceed against the sheriff, in case the bail do not justify, the notice must be in writing.

*Cohn v. Davis*, 1 H. Bl. 80. *R. v. Sh. of Middlesex*, 8 D. & R. 149. Also, if the notice of exception be not correctly intitled in the court or cause, the sheriff cannot be proceeded against by attachment. *R. v. Sh. of Middlesex*, 1 Chit. 741. *Anon. Id.* 375. And giving notice of exception, without previously entering the exception as above directed, is an irregularity; and although perhaps it may be waived as between the parties by the notice of justification, *Hanwell's bail*, 3 Dowl. 425, yet as between the plaintiff and the sheriff, *Thwaites v. Gallington* 4 D. & R. 365, or the bail to the sheriff, *Hodson v. Garrett*, 1 Chit. 174, it clearly is not. The following may be the form of the notice.

In the ———

Between [ &c.

Take notice that I have excepted against the bail put in for the defendant in this cause.

To Mr. C. D.

Your's &c.

Defendant's attorney

A. B.

Plaintiff's attorney.

There is one kind of exception, created by a late rule of court, that yet remains to be noticed. It has been already mentioned, (*ante*, p. 182), that by R. G. T. 1 W. 4, s. 3, an affidavit of the sufficiency of the bail, may accompany the notice of bail; and if the plaintiff afterwards except to them, he shall pay the costs of justification if they be allowed. And by R. G. T. 1 W. 4, s. 4, "if the plaintiff shall not give *one day's notice of exception* to the bail by whom such affidavit shall have been made, the recognizance of such bail may be taken out of court, without other justification than such affidavit." I own I cannot understand this rule, and feel great difficulty in attempting to give any construction to it. There have been two cases, however, by which it has been decided, that the rule does not extend to bail by a prisoner, *Webb's bail*, 1 Dowl. 446, or to bail put in after the expiration of the time limited for that purpose, *R. v. Wilson*, 3 Dowl. 255, or in fact, to any case of bail where an exception need not be entered in order to compel a justification. But it has never been decided to what cases it does extend.

If the bail be excepted to in vacation, and the notice require them to justify before a judge, they shall justify within four days from the time of such notice; otherwise, on the first day of the ensuing term. R. G. H. 2 W. 4, s. 17.

*Added bail.*] Formerly, if it were not intended to justify the bail put in, and of which notice was given, then, as soon as they were excepted to, other bail were added to the bail-piece, and their recognizance taken, as a matter of course.

Or the defendant might put in fresh bail upon another bail-piece, if he would. But now, by R. G. T. 1 W. 4, s. 5, "the bail, of whom notice shall be given, shall not be changed, without leave of the court or a judge." And the judge will require to be satisfied of the necessity of this, and that such necessity has not arisen from the negligence or misconduct of the defendant. This rule does not extend to the case of a prisoner; *Bird's bail*, 2 Dowl. 583; but see *R. v. Sh. of Essex*, *Id.* 782, *semb. cont.*; and therefore if the judge, upon application, refuse the order, the defendant must be rendered, and then, if necessary, he may be bailed as in ordinary cases. It extends however to the case of rejected bail; and if bail be rejected, no fresh notice of other bail can be given, without leave. *Jones v. Vestris*, 3 Bing. N. C. 677. *Elliot v. Gutteridge*, 6 Dowl. 255. If the order be granted, annex a copy of it to the notice of justification, and serve them upon the plaintiff's attorney. Where the order was not obtained until the day on which the bail were to justify, the court gave the plaintiff time to enquire into their sufficiency, saying, that until the order was obtained, he was not bound to make any enquiries. *Perry's bail*, 2 Crompt. & J. 475. Also, if the order be made upon payment of costs, the costs must be paid before the bail justify. *Jourdain v. Gunn*, 2 Tyr. 491.

*Justification, in what cases, where. &c.]* Where special bail are put in, they must justify, if excepted to, and, in some cases, whether excepted to or not, *sup.* 187, unless the plaintiff, by some act waive the justification. Formerly he was said to waive a justification, when he took a step in the cause, which was never taken until after bail had been perfected, and by which he was deemed, therefore, to admit that they were perfected; as for instance, if instead of declaring *de bene esse*, he declared absolutely; or if, having declared *de bene esse*, he demanded a plea or the like. But as since the stat. 1 & 2 Vict. c. 110, the proceedings upon the *capias* are only collateral to the action, there is now no objection to the plaintiff proceeding in the action, and to compel a justification, at the same time. See *Betts v. Smith*, 10 Law J. 305 *qb. ante*, p. 170.

Where bail, put in in due time, are excepted to, they must justify within four days after notice of exception, *R. E.* 5 G. 2. *K. B.*; *R. T.* 3 & 4 G. 2, *C. P. R. Ex. M.* 1 W. 4, s. 16, one day being reckoned exclusive, the other inclusive, *North v. Evans*, 2 H. Bl. 35, and see *Maycock v. Solymán*, 1 New Rep. 139. *Bond v. Evans*, 4 B. & C. 864. *St. Hanlais v. Byem*, 4 B. & C. 970; and this, even although the defendant may have put in his bail, before the time limited for that purpose by the practice of the court. *Seaver v. Spraggon*, 2 New Rep. 85. And as bail may now "be justified before a judge at chambers, both in term and vacation," *R. G. H.* 1 Vict. s. 1, they must

now justify within the four days, whether they be excepted to in term or vacation. If, however, the plaintiff have ruled the sheriff to bring in the body, the defendant may justify his bail at any time on or before the day on which the body rule expires, without reference to the time of serving the notice of exception: *See R. v. Sh. of Middlesex*, 8 T. R. 464; *R. T. 38 G. 3, C. P.*; *R. Ex. M. 1 W. 4, 515*: for the plaintiff cannot obtain an attachment against the sheriff, until the day after the body rule has expired; and we have seen (*ante* p. 170), that he cannot proceed upon the bail bond, pending the rule to bring in the body. *R. G. H. 2 W. 4, s. 23*. Even after the rule to bring in the body has expired, the defendant may justify his bail, as of course, at any time before the plaintiff has moved for his attachment. *Thorold v. Fisher*, 1 H. Bl. 9. *R. v. Sh. of Middlesex*, 2 M. & S. 562. *Waddall v. Berger*, 1 B. & P. 325. *but see R. v. Sh. of Middlesex*, 8 D. R. 137. But if bail have not been put in in due time, and the plaintiff have therefore proceeded against the sheriff, or upon the bail bond, bail in that case must not only be put in, but also perfected, although not excepted to; *Turner v. Cary*, 7 East, 607. *Nunn v. Rogers*, 2 Chit. 108. *Poole v. Poole*, 2 W. Bl. 1206; and then an application may be made to set aside the proceedings against the sheriff, or on the bail bond, as directed, *ante*, p. 172. But if no bail bond have been taken, and an action of escape be brought against the sheriff, the court will not allow bail to justify, which have not been put in in due time, whether the application to justify be made on the part of the sheriff, *Fuller v. Prest*, 7 T. R. 109, and *see Bird v. Bond*, 6 Taunt. 554, or on the part of the defendant. *Webb v. Matthews*, 1 B. & P. 225. And in these cases, the plaintiff does not waive any proceedings he may have taken, by opposing the justification. *Williams v. Waterfield*, 1 B. & P. 334.

Formerly, bail usually justified in term time in court. But as by stat. 11 G. 4, & 1 W. 4, c. 70, s. 12, bail may be justified before a judge, in chambers, or in some other convenient place by him to be appointed, as well in term as in vacation, and whether the defendant be actually in custody or not, and since the rule (*R. G. H. 1 Vict. s. 1*) already mentioned *ante*, p. 187, upon the subject, bail are now usually justified before a judge at chambers.

*Notice of Justification.*] The notice of justification in the Common Pleas, *Nation v. Barret*, 2 B. & P. 30, and in the Exchequer, *Dax*, 82, must be a two days' notice, both for original and added bail, *Key v. McIntyre* 2 Mee. & W. 347, the day of service being reckoned exclusive, the day of justification inclusive, and Sunday not being reckoned; as Tuesday for Thursday, Saturday for Tuesday. In the court of Queen's Bench, however, it is but a one day's notice for original bail,

as Tuesday for Wednesday, Saturday for Monday; *Wilson v. Hawkins*, 5 Dowl. 436; but it is a two days' notice for added bail. *Morgan's bail*, 1 Chit. 308. By R. G. H. 2 W. 4, s. 16, indeed, it is ordered that "it shall be sufficient in all cases, if notice of justification of bail be given, two days before the time of justification;" but this has been holden not to alter the practice before established. *Wilson v. Hawkins*, *supra*. There is but one exception to this, namely, where notice is given of putting in and justifying bail at the same time; which must be a four days' notice; *ante*, p. 184; but that does not extend to added bail, *Key v. M'Intyre*, *supra*, or to bail by a prisoner, *ante*, p. 187, or to country bail justifying after exception, according to the old practice. *Hardbottle v. Clark*, 4 Dowl. 12. *Jones's Bail*, 2 Dowl. 159. The notice of justification must be served before eleven o'clock in the forenoon of the day on which it is required to be given, according to the practice of the court. *R. T.* 59 G. 3, *K. B. & Exch.* *R. M.* 60 G. 3, *C. P.* See *R. v. Sh. of Middlesex*, 6 Dowl. 164. It must be correctly intitled in the court and cause. *Anon.* 2 Chit. 77. It must state the names of the bail correctly; *Jeffry's bail*, 1 Chit. 351. *Taylor v. Halliburton*, 1 Chit. 494, n. *Levi's bail*, 7 Moore, 282; and in the court of Common Pleas, it must give the description of the bail, in the same manner as in the notice of bail; *R. H.* 6 & 7 G. 4; 4 Bing. 51. *Welsh v. Lywood*, 1 Bing. N. C. 258; but this is not required, nor is it the practice in the Queen's Bench, *Higg's bail*, 1 Dowl. 124, or in the Exchequer, unless in the case of added bail. If the action be against several, and the bail be for some of them only, the notice must state for whom; and where in an action against four, the notice of bail was for two only, and the notice of justification for three, Parke, J. held the latter notice good for a justification on behalf of those two for whom the first notice was given. *Denton's bail*, 1 Dowl. 2. It is not usual to state in the notice at what hour the bail will justify, unless in the case of a notice of justification at chambers, when the hour must be stated. *Staines v. Stoneham*, 4 Dowl. 678. But the notice must state whether the justification is to be in court, or before a judge at chambers. It may be necessary to notice that by stat. 1 & 2 Vict. c. 45, s. 4, 5, the judges are empowered to appoint commissioners, for the taking of the justification of bail in vacation; but I am not aware that any such commissioners have as yet been appointed. See the form of the notice, and of the affidavit of service, in the Appendix.

Care must be taken that the notice of justification be by the same attorney who put in or gave notice of the bail, if there have been no order to change the attorney; otherwise the bail will not be allowed to justify. *Hill v. Roe*, 6 Taunt. 532. *Macpherson's bail*, 2 Chit. 93. *Macpherson v. Rorison*,

1 *Doug.* 217. But this does not extend to the case of a prisoner. *Crow v. Watson*, 2 *Chit.* 93. *Anon.* 1 *Tidd*, 259. And if bail to the sheriff put in bail above by their attorney, it seems that the defendant by his attorney may proceed to justify them. *R. v. Sh. of Middlesex*, 8 *D. & R.* 149, and see *Haggett v. Argent*, 7 *Taunt.* 47.

As to the notice of putting and justifying bail at the same time, see *ante*, p. 184.

*Opposing the justification.*] In court, bail justify at the sitting of it; but on the last day of the term, the court will allow bail to justify at the rising of the court, if from circumstances it appear that they were prevented from attending in the morning. *R. M.* 51 *G. 3, C. P.*; *R. E.* 56, *G. 3, Exch.*

If the sum indorsed on the writ be under 1000*l.* the bail must justify in double the amount; but if it exceed 1000*l.* then it will be sufficient for the bail to justify in 1000*l.* beyond the sum sworn to. *R. G. M.* 71 *G. 3.*

The following are the objections usually made to the justification of bail :

1. That there has been a change of attorney, without an order for that purpose. *Vide supra.*

2. That the bail are attorneys, or attorneys' clerks. *R. G. H.* 2 *W. 4, s. 13, ante*, p. 178.

3. That they are sheriff's officers, or others engaged in the execution of process. *R. M.* 14 *G. 2, r. 2, K. B.*; *R. M.* 6 *G. 2, r. 7, C. P.*

4. That no bail bond was taken, that bail was not put in in time, and that an action of escape is pending against the sheriff. *Fuller v. Prest*, 7 *T. R.* 109. *Webb v. Matthews*, 1 *B. & P.* 225, and see *ante*, p. 188.

5. That the bail are not housekeepers or freeholders. *Smith's bail*, 1 *Dowl.* 1. see *Savage v. Hall*, 1 *Bing.* 430. And where a person was tendered as bail, who, although a housekeeper in Scotland, was neither housekeeper nor freeholder in this country, but merely lived here in lodgings, Patteson, J. rejected him on this ground. *Anon.* 1 *Dowl.* 61.

6. That the bail is a peer, *Burton v. Atherton*, 2 *Marsh*, 232, or member of the House of Commons, *Duncan v. Hill*, 1 *D. & R.* 126. *Graham v. Sturt*, 4 *Taunt.* 249, or an ambassador, or the domestic servant of an ambassador, *Locke's Bail*, 1 *Dowl.* 124, or servant in the queen's household, *Anon.* 1 *D. & R.* 127, or other privileged person.

7. That the bail are indemnified by the defendant's attorney, *R. H.* 3 *G. 3, C. P.* *Preston v. Bindley*, *K. B.* 1 *Tidd*, 269, whether the indemnity be in writing or not. *Greensill v. Hopley*, 1 *B. & P.* 103. *Capon v. Dillamore*, 1 *Bing.* 423. Where a bail, although not indemnified, said that he thought the attorney would indemnify him, Bayley, J. rejected him ;



*Anon.* 1 *Dowl.* 1; but in another case, where one of the bail admitted that he became bail at the request of the defendant's attorney, the court of Common Pleas held it to be no objection, as it did not appear that he was indemnified by the attorney. *Hunt v. Blacquiére*, 4 *Bing.* 588.

8. That the bail are hired. *Foxhall's bail*, 7 *D. & R.* 783. and see *Ward v. Levi*, 1 *B. & C.* 268, 269. *Wyllie v. Jones*, 2 *D. & R.* 253.

9. That they have been before rejected as bail; *Monk's bail*, 1 *Chit.* 76; even although they have since become persons of property. *Pickard v. Dobson*, 3 *D. & R.* 5. But where the rejection had been merely on account of the bail being indemnified by the defendant's attorney, it was holden that the rule did not apply. — *v. Hallett*, 1 *D. & R.* 488. And in the Exchequer, it is no objection to bail that they have been rejected, unless it appear that they were rejected for insufficiency. *Goodwicke v. Turley*, 2 *Cr. M. & R.* 636.

10. That they are not worth property to the amount for which they are come to justify. The property may consist of lands, goods, good book debts, &c. But where a bail admitted that the property he had to qualify him to become bail, consisted of a sum of money deposited with him by the friends of the defendant, to indemnify him; he was rejected. *Nicholl's bail*, 1 *Hodg.* 77. So if the bail's property be all abroad, out of the jurisdiction of the court, he will not be allowed to justify. *Levy's bail*, 1 *Chit.* 258. *Wightwick v. Pickering*, *Forrest*, 138. *Boddy v. Leland*, 4 *Burr.* 2526. But a British subject, resident in this country, may justify in respect of property partly in this country and partly abroad. *Graham v. Anderson*, 4 *M. & S.* 371. *Beardmore v. Phillips*, 4 *M. & S.* 173. And the bail may be examined as to any collateral matters, from which the court may form a judgment whether he is telling the truth as to his property, or not. Where it appeared that the children of one of the bail were in the workhouse, and he would not disclose the reason; *Anon.* 2 *Chit.* 77; where he had suffered his father to receive parish relief; *Holm v. Booth*, 2 *Chit.* 78; where he had not paid his taxes, although often demanded; *Lewis v. Thompson*, 1 *Chit.* 309; where he had been sued for small debts; where executions had been sued out against him; where he was liable upon outstanding dishonoured bills, which he had not taken up; *Barnesdall v. Stretton*, 2 *Chit.* 79: in these and the like cases, bail have been rejected. So in an action on a bill of exchange against the drawer, Taunton, J. refused to allow the acceptor to justify; *Anon.* 1 *Dowl.* 183; but it is no objection that he is indorser, *Mitchell's bail*, 1 *Chit.* 287. *Harris v. Manley*, 2 *B. & P.* 526, or drawer. *Prime v. Beesley*, *Bing.* *N. C.* 391.

11. That the bail has been a bankrupt, and has not obtained

his certificate. *Anon.* 1 Chit. 9 (a.) But bankruptcy is not in strictness an objection to bail, if he have obtained his certificate, *Smith v. Roberts*, 1 Chit. 9, unless he were before a bankrupt, or discharged under an insolvent act, or compounded with his creditors, and have not paid 15s. in the pound under his present fiat; *Mountain v. Wilkins*, 1 Tidd, 247, and see 6 G. 4, c. 16, s. 127; or unless the bankruptcy be recent, and the bail cannot satisfactorily account for his possession, since his bankruptcy, of property to the amount for which he has come to justify. *Probst's bail*, 1 Chit. 288. *Butler's bail*, 2 Chit. 78. *Reaclin's bail*, 1 Chit. 3.

12. That he has been discharged under an insolvent act. *Smith v. Roberts*, 1 Chit. 9. *Curtis v. Smith*, 1 Chit. 116.

13. That he does not know the extent of his own liabilities: how often he has been bail in other actions; *Anon.* 1 Chit. 3 (b); whether he has been arrested, or how often, during a certain period; *Newman's bail*, 2 Chit. 95; or the like.

But it is not of itself an objection to bail, that he keeps a gambling house, *Anon.* 1 Dowl. 183, or a brothel, *Gouge's bail*, 3 Dowl. 320, or even that he has been transported; *Hatfield's case*, 2 Chit. 98; the enquiry being, not as to the character of the bail, but as to his sufficiency in respect of property.

*Further time, rejection, allowance, &c.*] The court may grant a further time to justify, if they think fit, in all cases; even where money has been deposited with the sheriff in lieu of bail, *Parker v. Turner*, 2 Chit. 71. If the bail attend to justify, and one or both fail to do so, by reason of the decision of the court upon any doubtful point of law, as to their being housekeepers, &c. or as to their right to justify by reason of certain property, or the like: the court will in general allow the defendant time to put in and justify other bail instead of them, and will stay the plaintiff's proceedings in the mean time. See *Varden v. Wilson*, 1 Chit. 287. But if they be rejected for insufficiency, under other circumstances, the court seldom grant a further time to justify other bail.

If one of the bail do not attend, and it be made out clearly by affidavit (see R. M. 36 G. 3, K. B.) that he consented to become bail, that if he had attended, he would have been able to justify as good and sufficient bail in the action, and that he has been prevented from attending by sudden and serious illness, or other inevitable cause, see *Guillim v. Howes*, 9 Chit 107. *Gablentz's bail*, 1 Har. & W. 111, or that although fully competent to become bail when he was first put in, yet that by some sudden and unforeseen circumstance he has ceased to be so, see *Dixon v. Clarke*, 1 Chit. 3. *Bold's bail*, 1 Chit. 288, or the like, the court will in like manner give a further time to put in and justify other bail; and where it

appeared that the plaintiff called upon the bail, and by his representations deterred them from justifying, not only further time was given to put in the bail, but Patteson, J., ordered the plaintiff to pay the costs. *Gwynne v. Fuller*, 1 Dowl. 444.

Or if the reason for the bail not attending, be not known at the time the motion to justify should be made, then, upon a similar affidavit to that above mentioned, but stating that he promised to attend, and that the reason for his non-attendance is not known, the court will in general grant a further time to justify, conditionally, upon the defendant's attorney producing before the judge at chambers, on the same day, a satisfactory affidavit of the reason for the bail not having attended.

If one of the bail alone attend, the court will not allow him to justify, unless the plaintiff consent. *White's bail*, 5 Dowl. 133, 2 Har. & W. 134. The plaintiff's counsel, however, usually consents to this, to save the expense and trouble of the bail attending a second time.

If the court grant a further time to justify, the notice of justification must be served before three o'clock in the afternoon of the same day; *R. T. 59 G. 3, K. B. & Exch. R. M. 60 G. 3, C. P.*; otherwise the bail shall not be allowed to justify, even although the length of notice actually given might be sufficient for an ordinary notice of justification. *Newton's bail*, 1 Gale, 171, 4 Dowl. 270. The rule, of course, is not served at that time, for it could not be had from the office so early; but it is usually served on the same evening, as in other cases. By the terms of the rule, the plaintiff is to be placed in the same situation, as if bail had on that day justified.

A rejection of one of the bail, is a rejection of both, *Levis v. Gadderer*, 5 B. & A. 734, unless further time be given to justify another bail instead of the one rejected. Even where the same bail came to justify in two causes, and justified in one, but were rejected in the second for a clear insufficiency, which would have been equally fatal in the first: the court, holding that the justification was not completed until the rule of allowance was drawn up, rejected them as bail in the first cause also. *Waterhouse's bail*, 1 Chit. 307. So where bail came up to justify in three actions, and they were opposed in two, and got time to make an affidavit relative to an objection that was made to them, Vaughan, J. refused to allow them to justify in the third action, in which they were not opposed. *Laport's bail*, 3 Dowl. 110.

If the bail justify, draw up the rule of allowance and serve it without delay: for until the rule of allowance is served, the bail is not deemed perfected. Even where the plaintiff was present at the time of the justification, and opposed it, and afterwards obtained an attachment against the sheriff for no

bringing in the body: the court held his proceeding regular, as it appeared that the rule of allowance had not been served; *R. v. Sh. of Middlesex*, 4 T. R. 493; and the same where the plaintiff proceeded upon the bail bond. *Holland v. White*, 2 B. & P. 341. and see *S. P. Bignold v. Lee*, 1 B. & C. 285. *R. v. Sh. of Middlesex*, 2 Dowl. 116.

After the rule of allowance is drawn up and served, the court will not set it aside, merely on the ground that the bail have committed perjury in justifying, *Eaglefield v. Stephens*, 2 Dowl. 438. *Shee v. Abbott*, 2 Brod. & B. 619. *A'Beckett v. —*, 5 Taunt. 776. *Lazarus v. Levaux*, 4 Dowl. 353. see *Barling v. Waters*, 6 Bing. 423, *cont.*, unless it appear that the defendant was privy to and implicated in it; *Stockham v. French*, 8 Moore, 381; in other cases they leave the plaintiff to his remedy by indictment. But where, after bail had justified, it was found out that one of them had been previously rejected for insufficiency: the court, upon application, set aside the rule of allowance, although it appeared that the bail had since become possessed of property. *Pickard v. Dobson*, 3 D. & R. 5. Where pending a rule for setting aside the allowance of bail, the bail rendered their principal, the court held that it was irregular, and that upon the rule being made absolute, the plaintiff was warranted in taking an assignment of the bail bond, and proceeding upon it. *Brown v. Jennings*, 2 B. & A. 768.

*Costs.*] In the court of Queen's Bench, "whenever two or more notices of justification of bail shall have been given, before the notice on which bail shall appear to justify, no bail shall be permitted to justify, without first paying (or securing to the satisfaction of the plaintiff, his attorney, or agent,) the reasonable costs incurred by such prior notices, although the names of the persons intended to justify, or one of them, may not have been changed; and whether the bail mentioned in any such prior notice, shall not have appeared, or shall have been rejected. *R. H. 2 & 3 G. 4. 5 B. & A. 559.*

In the court of Common Pleas, bail are not permitted to justify, until the costs of a former opposition are paid to the plaintiff, or a sum equivalent to them deposited with one of the masters; and this, even although the defendant be a prisoner. *R. v. Sh. of Middlesex*, 1 Taunt. 57.

In the Exchequer, also, after one successful opposition to bail, the defendant must either pay the costs of opposing them, or deposit with the master a sufficient sum for that purpose, before he will be allowed to justify other bail. *Smith v. Cooper*, 1 Tyr. 378. *Pasmore's bail*, 3 Dowl. 214. And this, as well in the case of country bail, as town bail. *Turley's bail*, 4 Dowl. 498. *S. C. nom. Goodricke v. Turley*, 2 Cr. M. & R. 636. As to the costs of the present opposition, if successful, as they

will be costs in the cause, the court seldom grant them, and never when the opposition is upon mere technical grounds. *Hanwell's bail*, 3 Dowl. 425.

In these cases, the application for costs, in the court of Queen's Bench, must be made before the bail are sworn; *Knight's bail*, 4 Dowl. 328, 1 Hodg. 370; but it is otherwise in the Exchequer. *Lewis v. Glossop*, 2 Cr. M. & R. 655.

Where an affidavit of the sufficiency of the bail has accompanied the notice of bail, as mentioned *ante*, p. 181, and the plaintiff has, notwithstanding, excepted to them: if the bail be allowed to justify, and the affidavit appear to be such as is required by the rule, the plaintiff must pay the costs of justification; but if the bail are rejected, then the defendant shall pay the costs of opposition, unless the court or a judge thereof shall otherwise order. *R. G. T. 1 W. 4, s. 3. See ante*, p. 181. And this extends to country bail, as well as town bail. *Grant's bail*, 3 Dowl. 165. The defendant, if he justify, will be entitled to his costs, whether the plaintiff appear or not; *Johnson's bail*, 1 Dowl. 514; and on the other hand, it must be a strong case, to induce the court to interfere to prevent a defendant paying costs, where his bail are rejected. *Evans's bail*, 1 Dowl. 384. The application for costs in this case, also, must be made at the time of the justification. *Freame v. Best*, 2 Dowl. 590.

These several rules apply only to cases where the bail appear to justify. But a defendant or his attorney may put a plaintiff to great expense and trouble, by giving repeated notices of bail, without attempting to justify them. And where six different notices of the same bail were given, the court compelled the defendant to pay the plaintiff's costs occasioned by them. *Aldiss v. Burgess*, 3 B. & A. 759. So, where the plaintiff had been put to the expense of inquiring after six sets of bail for a prisoner, as to one of whom a false description had been given, the court ordered the prisoner's attorney to pay the costs incurred by the plaintiff, although it was sworn that the attorney had no personal knowledge of the misdescription and insufficiency of the bail. *Blundell v. Blundell*, 5 B. & A. 533. See ——— *v. Clarke*, 2 Chit. 89.

## 2. Country bail.

The recognizance of bail is taken in town or in the country, not with reference to the residence of the defendant, but to the residences of the proposed bail. If the bail reside within ten miles of London or Westminster, they must be put in as bail before a judge's clerk in town, and must justify in person, as in the ordinary cases of town bail; *Anon.* 1 Cramp. & J. 516; if they reside beyond that distance, their recogni-

zances may be taken before a commissioner, and they may justify by affidavit; see 4 *W. & M. c.* 4, s. 2; or if one of the bail reside within the distance, and the other beyond it, the recognizance of the one must be taken in town, and he must justify in person, the recognizance of the other may be taken before a commissioner, and he may justify by affidavit. *Mandorff's bail*, 2 *Chit.* 90. This last case, however, seldom occurs in practice. Nor is it necessary that the recognizance should be taken before a commissioner in that county where the defendant has been arrested: if the arrest for instance be made in Middlesex, the bail may be put in before a commissioner in Denbighshire, *Moore v. Kenrick*, 3 *Bing.* 603, or elsewhere.

*When and how put in.*] Bail, we have seen (*ante*, p. 176) must be put in, on or before the eighth day after the arrest, the day of the arrest being reckoned inclusive. And as country bail is not deemed to be put in, until not only the recognizance is taken, but the bail piece transmitted and filed, and notice given, *Grant v. Gibbs*, 3 *Dowl.* 409, 1 *Hodg.* 56, care must be taken that all this be done within the time here mentioned; otherwise the plaintiff may proceed upon the bail bond or against the sheriff. *Grant v. Gibbs*, *supra*. *Day v. Greenway*, 5 *Dowl.* 243.

*Get a blank form of a bail piece, which may be had at any law stationer's, or you may have some sent to you by your agent; the forms vary in the different courts. Then write out an affidavit of justification upon plain paper, as directed infra, which may be either joint by both of the bail, or each may make a separate affidavit.* *Anon.* 1 *Dowl.* 115. *Take the bail piece and affidavit to a commissioner of the court for taking bails and let the bail accompany you. The commissioner will then take their recognizance, and the bail piece will be signed by them and by the commissioner; the bail also may be sworn before him to their affidavit of justification. Next write out an affidavit of the due acknowledgment of the recognizance; see the form, in the Appendix; and let it be sworn before a commissioner of the court for taking affidavits, (not being the defendant's attorney or his clerk, see R. G. H. 2 W. 4, s. 6,) by the attorney or person who accompanied the bail, when their recognizance was taken. Annex these two affidavits to the bail piece, and transmit them to your agent within such time, that he may have an opportunity to file the bail piece, and give notice of the bail, on or before the eighth day from the arrest, the day of the arrest being reckoned inclusive, as already mentioned, supra.*

*Affidavit of justification.*] If you are well satisfied as to the responsibility of the bail, and wish to proceed under R. G. T. 1 W. 4, s. 3, (*ante*, p. 181,) so as to obtain the costs of justification, in case the plaintiff should except to them, let your

affidavits of justification be in the form mentioned, *ante*, p. 181. If given in that form, great care must be taken that it be correct; for if it be not a good affidavit within the rule, the bail will be rejected, even although it would have been sufficient as an affidavit of justification in ordinary cases, independently of the rule. *Penon's bail*, 4 *Dowl.* 627, 1 *Har. & W.* 663. *Willer's Bail*, 6 *Dowl.* 312. Or the affidavit may be in the old form. In both cases, however, the "affidavits of justification shall be deemed insufficient, unless they state that each person justifying, is worth the amount required by the practice of the courts, over and above what will pay his just debts, and over and above every other sum for which he is then bail;" *R. G. H.* 2 *W.* 4, s. 19. See *Darling v. Hutchinson*, 2 *Tyr.* 491. *Henshaw v. Woolrich*, 1 *Crompt. & J.* 150. *Anon.* 1 *Dowl.* 115. *Hunt's bail*, 1 *Har. & W.* 520, 4 *Dowl.* 272; saying that they are "possessed" of such property, is not sufficient; for they may be possessed of it, and not worth it. *Hutchinson's bail*, 2 *Crompt. & J.* 487. *Rogers v. Jones*, 1 *Cr. & M.* 323. *Simpson's bail*, 1 *Dowl.* 605. *Okill's bail*, 2 *Dowl.* 19. *Harrison's bail*, 2 *Dowl.* 198. *Naylor's bail*, 3 *Dowl.* 452. So, that he is worth the amount "over and above all his just debts," omitting the words "what will pay," has been holden insufficient. *Edmunds v. Keate*, 6 *Dowl.* 359. If the affidavit be joint, care must be taken that the names of both the deponents are stated in the jurat; see *post*, tit. "Affidavit;" otherwise the bail will not be allowed to justify. See the form of the affidavit, in the Appendix.

*Affidavit of caption.*] The affidavit of caption, or taking of the recognizance, must be made by the clerk or person who accompanied the bail to the commissioner, as above mentioned, and must be sworn before a commissioner of the court for taking affidavits (not being the defendant's attorney or his clerk,) the bail-piece being previously annexed to it. See the form of the affidavit, in the Appendix.

*Notice of bail.*] As soon as the agent receives the bail-piece and affidavits, he takes the bail-piece and affidavit of caption to the judge's chambers, where the bail-piece will be allowed by the judge's clerk, and, in actions in the Queen's Bench, the bail-piece and affidavit are then filed; but in the Common Pleas and Exchequer, the bail-piece (after being thus allowed) and the affidavit, are taken to the master's office, and filed there. The agent then serves notice of bail on the plaintiff's agent. See the forms, in the Appendix.

In ordinary cases, the defendant's agent, at the time he serves notice of bail, usually leaves with the plaintiff's agent a copy of the affidavit of justification; it is not actually necessary that he should do so, but it often has the effect of preventing

an exception to the bail. But if the affidavit of justification be framed upon the rule T. 1 W. 4, s. 3, as already mentioned, *ante*, p. 181, the original must be filed with the bail-piece, a copy (and described to be so) must be delivered with the notice of bail, and the notice of bail must state where the original is filed. *See ante*, p. 182.

It seems that it is not necessary to state that the bail-piece is filed; *Wigley v. Edwards*, 2 Dowl. 282; but is usual to do so.

The rule T. 1 W. 4, s. 2, (*ante*, p. 179,) which requires notices of bail to describe with particularity not only the present residences of the bail, but their residences during the previous six months also, and whether they are housekeepers or freeholders, has been holden to extend to country bail, as well as to town bail. *Anon.* 1 Dowl. 259.

*Exception and notice.*] The practice in this respect is the same, as in town causes. See the practice, and the form of the notice of exception, *ante*, 183—185.

*Justification.*] The time for justifying is the same as in town causes. *See ante*, p. 186. The notice of justification also is the same (*see ante*, p. 187,) except that it states that the bail "*will justify themselves by affidavit in open court,*" &c. The objections that may be made to the bail, are the same in both cases. And the mode and time of justifying are also the same, except that the justification and opposition in country cases are by affidavit. If the affidavits in opposition state facts, which, if true, would have the effect of rejecting the bail, the court in general will give the defendant a reasonable time to produce affidavits in answer. Where time is thus given, however, the defendant will not be allowed to put in fresh bail, instead of answering the affidavits, *Green v. Hartley*, 1 Chit. 354, even although his time for putting in bail have not expired, and no attachment have issued against the sheriff. *Cockburn v. Ling*, 6 Bing. 732.

### 3. Bail by prisoners.

A prisoner, in custody on mesne process, may be bailed, at any time before he is actually charged in execution. *Stanton's bail*, 2 Chit. 73.

The practice is now the same as in other cases, both in term and vacation, except that it is not necessary to put in the bail, and then give notice of them, but the defendant may at once give two days' notice of putting in and justifying bail at the same time; and the notice may be the same precisely as the



four days' notice mentioned *ante*, p. 183, merely adding after the name of the defendant, in the body of the notice, the words "*now a prisoner in the prison of the marshal of the Marshalsea*," or "*in the prison of the Fleet*," or "*in the custody of the sheriff of ———*," as the case may be. It is doubted whether this is necessary: some cases holding that it is, *Croighton's bail*, 1 Cr. & M. 335. *Bullen's bail*, 3 Dowl. 422. *Poole's bail*, 2 Mees. & W. 312. and see *Frith's bail*, 2 Dowl. 229, others that it is not; *Pierce's bail*, 5 Dowl. 252; but it is better to add it. It is not necessary, however that the notice should be a four days' notice, within rule T. 1 W. 4, s. 1, mentioned *ante*, p. 182, 183; *Davis v. Grey*, 2 Tyr. 276; before that rule, prisoners were allowed, by the practice of all the courts, to give two days' notice of putting in and justifying bail at the same time, and the rule does not alter the practice in that respect.

It is not necessary to except to bail put in by a prisoner, see *Webb's bail*, 1 Dowl. 446, except perhaps when they are put in within the time limited for that purpose by the practice of the court.

The rule T. 1 W. 4, s. 5, which orders that "the bail of whom notice shall be given, shall not be changed without leave of the court or a judge," (*ante*, p. 186,) does not extend to the case of a prisoner. *Bird's bail*, 2 Dowl. 583. Nor will the court prevent him from justifying, until he pays the costs of former oppositions or notices. *Steer v. Smith*, 1 Chit. 44, 80. But if a prisoner vex or harass his plaintiff by repeated notices of bail, without a *bona fide* intention of justifying them, the court will oblige him or his attorney to pay the plaintiff the costs to which he may have been put by such proceedings. See *Blundell v. Blundell*, 5 B. & A. 533, *ante*, p. 194.

If the bail be rejected, or do not attend, the court will not grant a further time to justify; indeed it would be useless, for the defendant may himself give a fresh two days' notice of the same, or other bail, without the leave of the court. But if one of his bail have justified, in that case it may be necessary to get the leave of the court to justify another. *Foy's bail*, 2 Dowl. 442.

In the Queen's Bench, the rule of allowance directs the marshal to discharge the prisoner, and there is, therefore, no occasion for a supersedeas. But in that court, (if the defendant be in custody of the sheriff,) or in the court of Common Pleas, or Exchequer, whether he be in custody in the Fleet or of the sheriff, a writ of supersedeas must be sued out, the rule of allowance being the officer's warrant for signing it. See *Lock v. Craddock*, 7 Taunt. 437. And by R. C. P. H., 1 Vict. s. 2, the rule or order shall direct a supersedeas to issue forthwith.

## 4. Deposit of money, in lieu of special bail.

*When and how paid in.*] If the defendant, instead of giving a bail bond to the sheriff, have deposited with him the sum indorsed on the writ, together with £10 to answer costs, as mentioned *ante*, p. 175, and the sum have been paid into court, the defendant afterwards, instead of putting in and perfecting special bail, may pay into court a further sum of 10*l.* as an additional security for costs, and allow both sums to remain in court, to abide the event of the suit. 7 & 8 G. 4, c. 71, s. 2. *Get counsel's signature to a motion paper for this purpose, draw up the rule, and thereupon pay the money into court, at the master's office, and get a receipt for it in the margin of the rule. Then serve a copy of the rule and receipt upon the plaintiff's attorney.* This may be done at any time before the time for justification has expired; *Rowe v. Softly*, 6 Bing. 634. *Stamford v. M'Cann*, 2 Cr. M. & R. 632. *Stratford v. Love*, 3 Dowl. 593. 1 Har. & W. 195; but not after the sheriff has paid the money, deposited with him, over to the plaintiff. *Hannah v. Willis*, 6 Dowl. 417.

Or if the defendant, upon being arrested, either give a bail bond to the sheriff, or remain in custody, he may, instead of putting in and perfecting special bail, pay into court the sum indorsed on the writ, and a further sum of 20*l.* as a security for the costs of the action, there to remain to abide the event of the suit. 7 & 8 G. 4, c. 71, s. 2. *See Morgan v. Pedler*, 4 Dowl. 645. And where the defendant, having put in special bail, paid money thus into court before the time for justifying them, the court upon application ordered an *exoneretur* to be entered on the bail piece. *Stamford v. M'Cann*, 2 Cr. M. & R. 632. The money is paid in, &c. in this case, as in that last mentioned; but it may be made a part of the rule that the bail bond should be delivered up to be cancelled, *Smith v. Jordan*, 2 Moore & P. 428, or an *exoneretur* entered, if bail have been put in. Where the money was paid into court by one of the bail, and the plaintiff recovered in the action, the court ordered the money to be paid out to the plaintiff, notwithstanding the defendant had rendered in discharge of his bail. *Bull v. Turner*, 1 Mees. & W. 47.

The court of King's Bench, in one case, allowed the defendant to convert this into a payment of money into court, in the ordinary sense of the term, by admitting a debt to a certain extent, and moving that the plaintiff might take money out of court to that extent in discharge of the action, and that unless he did so, with costs to be taxed, the sum might be struck out of the declaration. *Hubbard v. Wilkinson*, 8 B. & C. 496. But the court of Common Pleas, in a subsequent case, refused to allow a part of the sum thus paid in to stand

as a payment into court upon a plea of tender, *Stultz v. Heneage*, 10 Bing. 561, 2 Dowl. 806, and have in a more recent case refused to allow it to be converted into an ordinary payment of money into court. *Ball v. Stafford*, 1 Hodg. 316.

In both of the above cases, the defendant must enter a common appearance, within such time as he would have been required to have put in and perfected special bail according to the practice of the court, otherwise the plaintiff may do so for him, and the cause may then proceed as if the defendant had put in and perfected special bail. 7 & 8 G. 4, c. 71, s. 2. and see 2 W. 4, c. 39, Sch. No. 4, w. 2. See *Hall v. Champneys*, 4 Dowl. 713.

Even after a defendant has put in and perfected special bail, he may, upon motion to the court, and if the court shall so think fit, pay into court the sum indorsed on the writ, with such sum to answer costs as the court shall direct, to abide the event of the suit; and the court may thereupon order a common appearance to be entered, and an *exoneretur* to be entered on the bail piece. 7 & 8 G. 4, c. 71, s. 4.

*When taken out by plaintiff.*] If judgment afterwards be given for the plaintiff, he may, by an order of the court upon motion, take the money out of court, or so much thereof as may be sufficient to satisfy the judgment and the costs of the application; 7 & 8 G. 4, c. 71, s. 2, and see *Freeman v. Paganini*, 2 Dowl. 776. *Johnson v. Wall*, 4 Dowl. 315. *Collins et al. v. Gwynne*, 1 Man. & Gr. 938. *Scherwinski v. Peronnet*, 6 Mees. & W. 90. *Know v. Duncan*, 9 Dowl. 179; and he must proceed in this way, and not sue out execution for the whole amount of the judgment. *Heus v. Pike*, 2 Tyr. 313. *Dax. Pr. Ex.* 97. The rule in this case is a rule to shew cause only. *Symes v. Rose*, 5 Bing. 269. *Lover v. Tolmin*, 5 Dowl. 388. If, after thus satisfying the judgment, &c., any part of the money still remained in court, the court, upon motion, will order it to be repaid to the defendant. 7 & 8 G. 4, c. 71, s. 2.

*When taken out by defendant.*] If judgment be given for the defendant, or the plaintiff discontinue his suit, or be otherwise barred, the court upon motion may order the money so paid into court, to be repaid to the defendant. 7 & 8 G. 4, c. 71, s. 2. Where the proceedings in the action were merely stayed, on account of the plaintiff not delivering a bill of particulars, the court refused to order the money to be thus paid out to the defendant, even although a year had elapsed. *Harden v. Harbourn*, 7 Dowl. 546. The rule in this case is a rule nisi only; *Wild v. Rickman*, 1 Har. & W. 670. *Grant v. Willis*, 4 Dowl. 581. *Lover v. Tolmin*, 5 Dowl. 389; it must be

the subject of a substantive application, and cannot be made a part of any other rule. *De Bedolliere v. Ryan*, 7 Dowl. 615. Where the defendant had obtained judgment, as in case of a nonsuit, however, the Court of Exchequer granted a rule absolute in the first instance. *White v. Urwin*, 8 Dowl. 202, 9 Law J. 150 *ex.*

Lastly, it is provided that a defendant who has thus paid money into court in lieu of bail, may, by order of the court, at any time before issue joined in law or in fact, or before interlocutory or final judgment, receive the same out of court, upon putting in and perfecting special bail, and upon payment of such costs to the plaintiff as the court shall direct. 7 & 8 G. 4, c. 71, s. 3. But where a defendant paid money thus into court, under protest as to the sufficiency of the affidavit, and afterwards moved to take it out, on the ground that the affidavit was defective: the court held that he could not do so; his paying the money into court was equivalent to perfecting special bail, after which he could not make any objection to the affidavit to hold to bail. *Green v. Glassbrook*, 1 Bing. N. C. 516. Where bail was put in and perfected after issue joined, and a motion then made to take the money out of court: the court refused it. *Hanwell v. Mure*, 2 Dowl. 155. But where the motion was made before issue joined, but the cause was in such a state that issue might be joined before cause should be shewn against the rule: the court granted the rule nisi with a stay of proceedings. *Bloor v. Cox*, 6 Dowl. 266. Where the defendant, after paying money thus into court, became bankrupt, and his assignees applied after verdict to have it paid over to them, the court held that it could not be done. *Ferrall v. Alexander*, 1 Dowl. 132. Where a third party deposited the money, and after judgment, rendered the defendant, and then applied to have the money paid out of court to him: the court held that it could not be done. *Bull v. Turner*, 4 Dowl. 734.

##### 5. Proceedings against bail.

The recognizance of bail being matter of record, the plaintiff may have his remedy upon it against the bail, either by *scire facias* or by action of debt. The bail are "liable to the sum sworn to by the affidavit of debt, and the costs of suit, not exceeding in the whole the amount of their recognizance;" *R. G. H. 2 W. 4, s. 21. see Vansandau v. Nash*, 2 Dowl. 767; and to that extent the plaintiff may recover, together with his costs in the *scire facias* or action against the bail.

[*Ca. sa. against the principal.*] No proceedings, either by *scire facias* or action of debt, can be had against the bail upon

their recognizance, before a *capias ad satisfaciendum* is taken out against the principal, lodged in the sheriff's office, and returned *non est inventus*. 2 *Saund.* 72 note. If this be not done, the bail may plead the matter to any *scire facias*, or action against them. *Philpot v. Manuel*, 5 D. & R. 615. In this last case it was holden, that the bail could not move to, set aside the proceedings on this account. But in another case in the court of Common Pleas, where an application was made to set aside a *scire facias* against bail for irregularity, on the ground that the *ca. sa.* was tested in June, though the trial did not take place until October, and it was directed to and lodged with the sheriff of Middlesex instead of the sheriffs of London: that court held that although the matter might be pleaded, it might also be made the subject of summary application to the court, and they set aside the proceedings with costs. *Goldney v. Laporte*, 2 Bing. N. C. 456, 4 Dowl. 639, 1 Hodg. 431. and see *Hovenden v. Crawther*, 1 Dowl. 170. Where the proceedings against the bail were commenced on the 3d November, and the application was not made until the 13th, the court held it to be too late. *Pocock et al. v. Cockerton*, 7 Dowl. 21. In such a case, the affidavits may be entitled in both actions. *Id.*

The Uniformity of Process Act, and the New Rules, &c. have made it somewhat uncertain in what manner the *ca. sa.* in this case shall be framed. Formerly the writ must have been tested in term time, either in the term to which the judgment in the original action had relation, or in some subsequent term; *Gawler v. Jolley*, 1 H. Bl. 74; it must also have been returnable in the same or a subsequent term; and it must have had a certain number of days between the teste and return, namely, eight days at least in actions by bill, and fifteen days in actions by original. *R. G. H. 2 W. 4, s. 77.* But the stat. 2 W. 4, c. 39, abolished the proceeding by bill and by original. And lastly, by stat. 3 & 4 W. 4, c. 60. s. 2, it was enacted, that all writs of execution "*may be tested on the day on which the same are issued, and be made returnable immediately after the execution thereof.*" It has been holden, however, that a *ca. sa.* returnable thus, cannot be made the foundation of proceedings against bail, even although a judge's order to return it have been obtained; and the court recommended that the old form of *ca. sa.* should in all cases hereafter be adopted. *Kemp v. Hyslop*, 1 Mees. & W. 58. But this does not relieve the case of much difficulty, as the old practice is at present in a great measure inapplicable. First as to the teste of the writ: as a judgment now has no relation back, but is deemed a judgment only of the day on which it is signed, whether that be in term or vacation, (*R. G. H. 4, W. 4, r. 2, s. 3.*) the *ca. sa.* must now bear teste on some day after the judgment is actually signed; See *Englehart v.*

*Dunbar*, 2 Dowl. 202; and there appears to be no objection to teste it on the day on which it is sued out, whether in term or vacation, according to the above statute, without making it returnable *immediatè*. Then as to the return, the writ must be made returnable, not *immediatè*, but on some day in the same or following term, according to the case of *Kemp v. Hyslop* above mentioned. And as to the number of days between the teste and return, the old rule upon the subject can scarcely be deemed a guide, as at present actions are not commenced either by bill or by original; but I think that in the Common Pleas there must be 15 days at least between the teste and the return, and in the Queen's Bench and Exchequer it will be prudent to observe the same practice, until there shall be some decisions to the contrary. In all cases it must be directed to the sheriff of the county, in which the venue in the original action was laid. 2 Saund. 72 a. and see *Golney v. Laporte*, 2 Bing, N. C. 456, 4 Dowl. 639, 1 Hodg. 431.

The writ must, be lodged at the sheriff's office six days at least before it is returnable, so that it may lie there four clear days, exclusive of the day on which it is lodged, and of the day on which it is returnable; 2 Saund. 72 b; and Sunday is not reckoned as one, even although it be not the last of the four. *Furnell v. Smith*, 7 B. & C. 693. *Howard v. Smith*, 1 B. & A. 528. And these four days must be the last four days before the return day. *Cock v. Brockhurst*, 13 East. 588. Also, in London and Middlesex, the *ca. sa.* must be "entered four clear days in the public book at the sheriff's office." R. G. H. 2 W. 4, s. 77. See *Hutton v. Burke*, 5 M. & S. 323.

As soon as the writ is returnable, get it returned *non est inventus*, and filed, after which you may commence proceedings against the bail. But if the defendant be really in the sheriff's custody at the time, though at the suit of another party, the sheriff will not be warranted in returning *non est inventus*; nor will such return warrant proceedings against the bail, and the court will set the same aside, *Forsyth v. Marriot*, 1 New Rep. 251. *Burks v. Maine*, 16 East, 2, particularly if the plaintiff knew of the defendant's being in custody at the time. *Ward v. Brumfit*, 2 M. & S. 238. But where the plaintiff did not know of it, and it appeared that the defendant was in custody at the suit of other persons, but by a different name from that in which he was sued by the plaintiff: *Patteson, J.* refused to set aside the proceedings against the bail on this ground. *Briggs v. Richardson*, 2 Dowl. 158.

Where a *ca. sa.* was sued out, and returned *non est inventus*, and upon the bail being sued, they rendered their principal; but the principal was afterwards again bailed, and discharged: it was holden that proceedings could not be taken against the latter bail, without suing out a fresh *ca. sa.* *Thackray v. Harris*, 1 B. & A. 212.

The court will in some cases amend the *ca. sa.* where it is erroneous; *Englehart v. Dunbar*, 2 Dowl. 202; but they will in general take care that the bail are not prejudiced by it. See *Bradley v. Bailey*, 3 Dowl. 111.

*Scire facias.*] The *scire facias* must issue out of the court in which the original action was brought. 2 Saund. 72 b. It may issue at any time after the return of the *ca. sa.*; indeed it may issue on the very day on which the *ca. sa.* is returnable. *Stewart v. Smith*, Ld. Raym. 1567. and see *Shivers v. Brooks*, 8 T. R. 628. It must in all cases be directed to the sheriff of Middlesex, R. G. H. 2 W. 4, s. 80, for in that county the recognizance is presumed to be recorded. It must be tested in term time; but it is not necessary that it should be tested on the return day of the *ca. sa.* against the principal. *Sandland v. Claridge*, 1 Cr. & M. 672. It must be returnable also in term; and if it be intended to sue out one writ only, there must be 15 days at least between the teste and return; or if a *sci. fa.* and *alias* (which now seldom occurs in practice), then 15 days at least between the teste of the first writ and the return of the second.

The *sci. fa.* when sued out, must be lodged at the sheriff's office; and, like the *ca. sa.* against the principal, must lie there the last four clear days before the return day, exclusive of the day on which it was lodged and the day on which it is returnable. *Dicas v. Perry*, 2 D. & R. 969. *Wilson v. Farr*, 4 B. & A. 537. *Forty v. Hermer*, 4 T. R. 583. *Williams v. Mason*, 1 East, 89, n. And a Sunday, *Frazer v. Miller*, 1 Dowl. 141, or a dies non, *Scott v. Larkin*, 7 Bing. 108, is not reckoned, even although it be not the last of the four; and this, as well where *scire feci* is to be returned, as where the return is to be *nihil*. *Williams v. Mason*, 1 East, 89 n. *Saunderson v. Brown*, 6 Dowl. 9.

If the bail reside in Middlesex, they may be summoned; and this may be done now, as formerly, on the return day of the writ, at any time before the rising of the court on that day. *Lewis v. Pine*, 1 Cr. & M. 771. *Clark v. Bradshaw*, 1 East, 86. But if they reside elsewhere, and of course cannot be summoned (the *sci. fa.* being directed to the sheriff of Middlesex in all cases), then a notice of the *sci. fa.* must be given to them. *Wimall v. Cook*, 2 Dowl. 173.

As to the entry of the recognizance upon the roll, see 2 Saund. 72 b. And as to the other proceedings, see "*Scire facias*," post. The execution may be either joint against both of the bail, or several against each. 2 Saund. 72 b. See *infra*.

*Action of debt.*] An action of debt on the recognizance, may be brought against both of the bail jointly, or against each of

them separately; 2 *Saund.* 72 *b*; but separate actions are much discouraged by the court, unless there be some reasonable cause for bringing them. The process in the action must be by writ of summons "in debt upon recognizance." It may be sued out at any time after the return of the *ca. sa.* against the principal, even on the same day. *Shivers v. Brooks*, 8 *T. R.* 628. And see *Pinero v. Wright*, 2 *B. & P.* 235. In the Common Pleas the plaintiff cannot have execution against bail by *ca. sa.*; *Wooden v. Moxon*, 6 *Taunt.* 490. *Troughton v. Clarke*, 2 *Taunt.* 113; but he may in the Queen's Bench and Exchequer.

To entitle bail to a stay of proceedings pending a writ of error, the application must be made before the time for surrender is out. *R. G. H. 2 W.* 4, *s.* 84. And the court in that case will stay the proceedings against the bail, on the terms of their undertaking to pay the damages recovered, or to render the defendant, within four days of the determination of the proceedings in error, if determined in favour of the original plaintiff. *Sprang v. Monprivatt*, 11 *East*, 316. Or if the writ of error be allowed and the allowance served, before the return of the *ca. sa.* against the principal, so entirely is the writ of error a *supersedeas*, that any proceedings afterwards taken against the bail, will be irregular, and the court will set them aside with costs. *Miller v. Neubald*, 1 *East*, 662. *Perry v. Campbell*, 3 *T. R.* 390.

#### 6. In what cases bail discharged.

If the principal be taken in execution on the *ca. sa.*, the bail are thereby discharged.

If the bail render their principal, and give notice of render, within the time limited for that purpose by the practice of the court, they are thereby discharged. Where the plaintiff proceeds by action of debt on the recognizance, the bail may render their principal at any time within fourteen days after the service of the process upon them, but not later: and upon such render being duly made, and notice given, the proceedings shall be stayed, upon payment of the costs of the writ and service thereof only. *R. G. M. 4 W.* 4. If the costs be not paid, the plaintiff may proceed in his action. *Horn v. Whitcombe*, 5 *Dowl.* 328. If the proceeding against the bail be by *scire facias*, the bail, formerly in the courts of King's Bench and Exchequer, had, until the return of the *sci. fa.* if they were summoned, or until the return of the *alias*, if they were not, to render their principal; and in the court of Common Pleas, they had until the appearance day. How far that may now be deemed to be altered by the Uniformity of Process Act and



the New Rules, has not been decided. Where the bail are not summoned upon the *sci. fa.* (and we have seen, *ante*, p. 204, that it is only where they reside in Middlesex that they can be summoned), no judgment can be signed without leave of the court or a judge; but with such leave, it may be signed after eight days from the return of one *scire facias*. *R. G. H. 2 W. 4, s. 81.* And probably if a render were made within these eight days, the court or a judge would not give leave to sign the judgment. This point, and the subject generally, will be treated of in detail, under the title "*Render*."

After the original cause is out of court, the plaintiff cannot proceed against the bail; *Sykes v. Banwens*, 2 *New Rep.* 404; and a cause is now deemed to be out of court, if the plaintiff do not declare within one year after process is returnable. *R. G. H. 2 W. 4, s. 35.*

If the plaintiff recover for a different cause of action from that stated in his affidavit to hold to bail, the bail are discharged. Where the defendant was holden to bail on the money counts only, and the declaration also contained a count for a cause of action, for which he could not have been holden to bail without a judge's order, and the plaintiff had a verdict on the latter count only, the court held that the bail were discharged. *Caswell v. Coare*, 2 *Taunt.* 107. *Thompson v. Macirone*, 4 *D. & R.* 619, and see *Edge v. Frost*, 4 *D. & R.* 243. So where the affidavit was on a bill of exchange only, and the plaintiff recovered upon the bill, and also for goods sold, it was holden that the bail were liable only for so much as was recovered upon the bill. *Wheelright v. Jutting*, 7 *Taunt.* 304. See *Taylor v. Wilkinson*, 6 *Ad. & El.* 533. But it cannot be made the matter of a plea to a *scire facias* against bail, that the plaintiff has recovered for more causes of action than mentioned in his writ or affidavit to hold to bail; *Taylor v. Wilkinson*, 3 *Ad. & El.* 784; it is merely a ground for application to the court, as to the excess. Nor can the bail now move for an *exoneretur*, before proceedings had against them, merely on the ground of the plaintiff's having declared for a different cause of action from that expressed in the writ; *Ward v. Tummon*, 4 *Nev. & M.* 876; all that can be done in such a case is to set aside the declaration for irregularity. *Id.* See *Coppin v. Potter*, 1 *Bing. N. C.* 443. Formerly the bail were discharged, if the venue laid in the declaration were different from the county into which the first process issued; but this is no longer the case. *R. G. H. 2 W. 4, s. 40.*

If the original action be referred to arbitration, the bail are thereby discharged, unless a verdict be taken for the plaintiff. 2 *Saund.* 72 *a.*

If a writ of error be brought and allowed, before the *ca. ss.* against the principal is returnable, all proceedings against the

bail are thereby suspended pending the writ; and if any be taken, the court will set them aside for irregularity; *Miller v. Newbald*, 1 East, 662. *Perry v. Campbell*, 3 T. R. 390; or the bail may plead the matter to the *scire facias* or action. *Sampson v. Brown*, 2 East, 439, and see *Sherratt v. Floyer*, 2 Bing. 18.

If a plaintiff take a cognovit from the principal, without the consent of the bail, or one of them, *Thomas v. Young*, 15 East, 617. See *Howard v. Bradberry*, 3 Dowl. 92. *Hodgson v. Nugent*, 5 T. R. 277, and thereby extend the period for payment beyond that at which he might have judgment; *Bowsfield v. Tower*, 4 Taunt. 456. *Croft v. Johnson*, 5 Taunt. 319. *Stevenson v. Roche*, 9 B. & C. 707. *Ladbroke v. Hewett*, 1 Dowl. 488. See *Hannington v. Beare*, 4 Dowl. 256; or if he give him time in any other way, without their consent, *Willson v. Whitaker*, 7 Taunt. 53. *West v. Ashdown*, 1 Bing. 164. See *Melvill v. Glendinning*, 7 Taunt. 126. *Brickwood v. Annis*, 5 Taunt. 614. *Vernon v. Turby*, 4 Dowl. 660. *Spyer v. Carper*, 5 Dowl. 448, if the time so given expire after the plaintiff could otherwise have obtained final judgment, but not otherwise: *Whitfield v. Hodges*, 1 Mees. & W. 679: the bail are thereby discharged. Or even if time be given with the consent of the bail, and the principal make default, a reasonable notice must be given to the bail, before any proceedings are taken against them, in order that they may have an opportunity of rendering their principal. *Clift v. Gye*, 9 B. & C. 422. *Surman v. Bruce*, 2 Dowl. 777. *Charlton v. Morris*, 6 Bing. 427.

If the principal become a peer, *Trinder v. Shirley*, 1 Doug. 45, or member of the House of Commons, *Langridge v. Flood*, 1 Tidd. 293, the bail are thereby discharged.

If the principal die before the return of the *ca. sa.*, the bail are thereby discharged; but if he die after it, even before any proceedings had against the bail, *Filewood v. Popplewell*, 2 Wils. 61, 65, or before the *ca. sa.* and return are filed, *Rawlinson v. Gunston*, 6 T. R. 284, they are not.

If the principal become bankrupt, and his certificate be signed and allowed, before the time for rendering him has expired, the bail are thereby discharged. *Mannin v. Partridge*, 14 East, 599. *Todd v. Maxfield*, 3 B. & C. 222. *Martin v. O'Hara*, *Coup*. 823. *Johnson v. Linsey*, 1 B. & C. 247. *Willett v. Pringle*, 2 New Rep. 190. *Harmer v. Hagger*, 1 B. & Ald. 332. And see *Stapleton v. Macbar*, 7 Taunt. 589. Or if the plaintiff prove for his debt under the fiat, as he thereby elects to take his remedy under it, and abandons his action against the principal, the bail will be discharged. See 6 G. 4, c. 16, s. 59. *Linging v. Comyn*, 2 Taunt. 246. So if the principal be discharged under an insolvent act before the bail are fixed, the bail are thereby discharged; — *v. Bruce*, 2 Chit. 105;

but otherwise, if after the bail are fixed. *Shakespeare v. Phillips*, 8 East, 433.

If the principal be sent out of the country under the alien act, *Merrick v. Vaucher*, 6 T. R. 50. See *Coles v. De Hayne*, 6 T. R. 52, 246. *Folkein v. Criteco*, 15 East, 457, or convicted of felony and sentenced to transportation, *Wood v. Mitchell*, 6 T. R. 247, the court will order an *exoneretur* on the bail-piece.

But the bail are not discharged, by their principal becoming a lunatic; *Ibbotson v. Ld. Gahway*, 6 T. R. 133; or by the plaintiff suing out a *fi. fa.* against the principal, unless the debt be thereby satisfied; *Stevenson v. Roche*, 9 B. & C. 707; or by the plaintiff laying the venue in a different county from that mentioned in the process, *R. G. H. 2 W. 4, s. 40*, although formerly it was otherwise; or by the plaintiff suing in equity for the same cause, and, being there put to his election, electing to proceed in that court. *Horsley v. Walstab*, 7 Taunt. 235.

#### 7. Render in discharge of bail.

*In what cases.*] Wherever bail to the action have been put in, such bail may render their principal, if he be at large. If he be in custody in a civil action, the bail as a matter of course may have a *habeas corpus cum causâ*, to bring him up, for the purpose of being rendered in their discharge; but where he was in custody in the prison of the palace court, and the action there had already been removed and sent back by *procedendo*, the court held that they could not grant the *habeas* in such a case, as the stat. 21 J. 1, c. 23, s. 3, prohibited the cause from being again removed. *Lawes v. Hutchinson*, 3 Dowl. 506. If he be in custody of the sheriff on a criminal account, the bail in an action in the court of Queen's Bench may have a *habeas* to bring him up, for the purpose of render, that court having a criminal as well as civil jurisdiction. *Sharpe v. Sheriff*, 7 T. R. 226. In like manner, that court will grant a *habeas* to the keeper of any prison, to bring up a prisoner in his custody on a criminal account, *Daniel v. Thompson*, 15 East, 78, if the prisoner be there for safe custody only, and not for punishment. *Gunn v. Cromer*, MS. T. 1825. And where the principal was a bankrupt, and was committed to Newgate by the commissioners for not satisfactorily answering certain questions, that court granted a *habeas* to bring him up to be rendered in discharge of his bail; the *habeas* issued on the crown side of the court, on which side also the render was taken, and a commitment to the marshal *pro formâ*; and he was thereupon recommitted to Newgate, charged with the several matters. *Taylor's case*, 3 East, 232. The court of Common Pleas, however, having no cri-

minal jurisdiction, cannot issue a habeas for such a purpose, where the principal is in custody on a criminal charge; *Currie v. Kinnear*, 1 Brod. & B. 23. *Bennett v. Kinnear*, 3 Moore, 259. *Walsh v. Davies*, 2 New Rep. 245. *Waugh v. Ashford*, 3 Dowl. 123. and see *Joyce v. Pratt*, 6 Bing. 377; nor will the court of Exchequer. The court of Common Pleas have also refused to grant a *habeas*, where the principal was in custody of the sheriffs of London under an extent from the crown, without the consent of the crown; and the crown having consented, provided the prisoner should be remanded to his former custody, the court still refused to interfere, as they doubted if they had authority to commit to any other custody than that of the warden. *Hodson v. Temple*, 5 Taunt. 503. So, the court of King's Bench refused a *habeas*, where the principal was in custody of a messenger under an order of a Secretary of State, by virtue of the Alien Act. *Folkein v. Critico*, 13 East, 457. But a person enlisted, may be rendered by his bail, in their discharge. *Bond v. Isaac*, 1 Burr. 339.

What has now been stated, must be considered as having reference to renders, where the action is in one of the courts of law at Westminster. But where in an action in the court at Durham, the defendant's bail, wishing to render him, and not being able to do so as he was then a prisoner in the King's Bench prison, applied to the court of King's Bench for a *certiorari* to remove the record, in order that they might do so here: the court refused it. *Paterson v. Reay*, 2 D. & R. 177.

A render is in all cases equivalent to a justification of bail. And, therefore, where a defendant, upon being arrested, paid the money to the sheriff, under stat. 43 Geo. 3, c. 46, (*ante*, p. 175,) and afterwards put in bail, but one of these being excepted to, he rendered: it was holden that he was entitled to have the money paid back to him, although the statute only gives him that right, in terms, in case he put in and perfect bail in due time. *Brook v. Gunning*, 9 Law J. 128 cp. 8 Dowl. 11. *Harford v. Harris*, 4 Taunt. 669. *Chadwick v. Battye*, 3 M. & S. 283.

*Within what time.*] A render, in order to discharge or relieve the sheriff, should perhaps be made before the expiration of the rule to bring in the body; but if it be completed at any time before the attachment is actually moved for, it will be sufficient. *R. v. Sh. of Middlesex*, 7 T. R. 527. *Thorold v. Fisher*, 1 H. Bl. 9. *R. v. Sh. of Middlesex*, 2 Smith, 243. *R. v. Sh. of Middlesex*, 1 Mees. & W. 182. But where time is given to justify, and, instead of justifying, the bail render their principal, the court will not set aside an attachment afterwards obtained, unless upon payment of costs. *R. v. Sh. of Middlesex*, 4 Dowl. 358. And see *R. v. Sh. of Middlesex*, 2 D. & R. 225. So, where the render was made pending a rule to set aside

the allowance of bail, and which allowance was afterwards set aside, and the plaintiff, treating the render as insufficient, proceeded upon the bail bond: the court held that he had a right to do so. *Brown v. Jennings*, B. & A. 768.

In order to discharge the bail to the action, where an action of debt is brought upon the recognizance, the render may be "at any time within 14 days after the service of the process upon them, but not at any later period; and upon such render being duly made and notice given, the proceedings shall be stayed, upon payment of the costs of the writ and service thereof only." *R. G. T. 3 W. 4*. The court will not give effect to a render made after the time here mentioned, even upon terms. *Bird v. Atkins, et al.* 7 Dowl. 769. Intervening Sundays are reckoned. *Cresswell v. Green*, 15 East, 537. If the costs be not paid, the plaintiff may proceed in his action. *Horne v. Whitcombe*, 5 Dowl. 328.

Where the plaintiff proceeds against the bail by *scire facias*, formerly in the court of King's Bench the bail in actions by bill had until the return day, if summoned, or until the return day of the *alias* where *nihil* was returned, to render their principal; see *Webb v. Harvey*, 2 T. R. 757; and in actions by original, they had until the *quarto die post* of these returns respectively. *Bell v. Jackson*, 4 T. R. 663. In the court of Common Pleas, they had also until the *quarto die post*, of these returns; *R. M.* 1654, s. 12. *Simmons v. Middleton*, 1 Wil. 269; and in the Exchequer, until the return day of these writs respectively. But as now, no judgment can be signed on a *sci. fa.* without the leave of the court or a judge, in cases where the bail are not summoned, (and we have seen, *ante*, p. 204, that it is only where they reside in Middlesex that they can be summoned,) and even with such leave it cannot be signed until after eight days from the return of one *scire facias*, if a render be made within these eight days, the court or a judge will not give leave to sign the judgment; and upon application will order an *exoneretur* to be entered on the bail piece. *Sanderson v. Brown*, 7 Ad. & El. 261.

Where one of the bail being served with a writ in an action on the recognizance, died before the appearance day, and therefore a fresh action was brought against his executor, it was holden that the executor had the same time to render the principal, as if the second action were brought against him as one of the bail. *Meddowncroft v. Sutton*, 1 B. & P. 61. Or if, after commencing an action on the recognizance, the plaintiff die, and his executor brings another action, the bail have the same time to render their principal in this second action, as if no previous action had been brought. *Wilkinson v. Vass*, 8 T. R. 422. And the same, if the plaintiff discontinue a first action, and bring a second. *Hoare v. Mingay*, 1 Str. 915.

Formerly a render on the last day of the time limited for

that purpose by the practice of the court, must have been made during the sitting of the court. But now, by R. G. H. 2 W. 4, s. 22, "bail shall be at liberty to render the principal, at any time during the last day for rendering, so as they make such render before the prison doors are closed for the night."

*Time enlarged.*] The court will seldom enlarge the time thus allowed for rendering. Where the first render was in time, but it was to the wrong county gaol, and owing to this mistake, the render in the right county did not take place within the time limited: Coleridge J. refused to set aside the proceedings against the bail, even on payment of costs. *Bird v. Atkins et al.* 7 Dowl. 769. Even where it was sworn that the principal was so ill, it would endanger his life to remove him, the court refused it. *Wynn v. Petty*, 4 East. 102. But where he was already in custody, and such a return was made to a *habeas corpus*, the court gave time. *Winstanley v. Gaitskell*, 16 East, 389. So, where there was a commission of lunacy against the principal, and he still continued lunatic, the court held it to be no ground for giving time to render, unless there were special circumstances in the case, which might call upon them for the exercise of their discretion. *Cock v. Bell*, 13 East, 355. But it has been holden that a lunatic may be brought up by *habeas* from St. Luke's Hospital, to be rendered in discharge of his bail. *Pillop v. Sexton*, 3 B. & P. 550. So, it has been holden no ground for enlarging the time, that the principal had been unwarrantably arrested and detained by a foreign state. *Grant v. Fagan*, 4 East, 189. But if by an act of state of our own government,—as for instance, if the principal, an alien, be in the custody of a messenger for the purpose of being sent out of the country,—the court, although they will not grant a *habeas* in such a case, will take care that the bail are not prejudiced. *Folkein v. Critico*, 13 East, 457. So where the principal was undergoing imprisonment for a misdemeanor in a county gaol, at the time when he ought to be rendered, the court of Exchequer gave the bail until a week after the term of imprisonment should expire, to render him. *Ashmore v. Fletcher*, 13 Price, 523. *Rouch v. Boucher*, 10 Price, 104. *Campbell v. Ackland*, 1 Cromp. & M. 73. So, where the principal became bankrupt, and was committed by the court of bankruptcy for not satisfactorily answering certain questions put to him, the Court of Common Pleas gave time until the 5th day of the following term to render him. *Waugh v. Ashford*, 1 Bing. N. C. 294. See *Joyce v. Pratt*, 6 Bing. 377. Where the principal has become bankrupt, the court, in the case of a country *flat*, will in general enlarge the time for rendering him, for a certain time after his last examination. *Maude v. Jowett*, 3 East, 145. *Glendining v. Robinson*, 1 Taunt.

320. *Crump v. Taylor*, 1 *Price*, 74. *Harris v. Alcock*, 2 *Tyr.* 418. *Gibson v. White*, 2 *Tyr.* 162. And in one instance, the court of Exchequer have done this in the case of a London fiat, and Parke, B. said that he knew no distinction between cases of town and country fiats in this respect; *Ruston v. Greene*, 2 *Dowl.* 617; but the court of Common Pleas have refused to do so. *Coombs v. Dod*, 2 *Dowl.* 766. *Shaw v. Cash*, 4 *Bing.* 80.

So if the principal have brought a writ of error, the court upon application will stay proceedings against the bail until the writ of error has been determined; *Capron v. Archer*, 1 *Burr.* 334. *Bennett v. Forrester*, 2 *Price*, 296; provided the application be made before the time for rendering has expired. *R. G. H.* 2 *W.* 4, s. 84.

*By whom and how.*] A defendant can only be rendered by his bail: that is to say, by bail put in to the action. Formerly he could have rendered himself to the sheriff, in discharge of his sureties to the bail bond, at any time before the return day of the writ; but as the writ is now returnable the moment it is executed, he can no longer render to the sheriff, whether the latter have been ruled to return the writ or not. *Hodgson v. Mee*, 5 *Nev. & M.* 302, 1 *Har. & W.* 398, overruling *Turner v. Brown*, 2 *Dowl.* 547. Bail above, therefore, must be put in, in order to render him. But it is not necessary that the bail should justify for the purpose; *Hall v. Walker*, 1 *H. Bl.* 638. *Edwin v. Allen*, 5 *T. R.* 401. *R. v. Sh. of Essex*, 5 *T. R.* 633. *Moysey v. Carnill*, 5 *T. R.* 534. *Saver v. Spraggon*, 2 *New Rep.* 85. *Gore v. Williams*, *Ant.* 653. *Mitchell v. Morris*, 2 *W. Bl.* 1179. *R. v. Sh. of Middlesex*, 4 *Dowl.* 673. *R. T.* 33 *G.* 3, *K. B.*; nor is it necessary even to give notice of their being put in; *Short v. Doyle*, 4 *Dowl.* 202. *Wilson v. Griffin*, 2 *Crompt. & J.* 683; and by *R. G. H.* 2 *W.* 3, s. 20, "bail, though rejected, may render their principal, without entering into any fresh recognizances." Where however bail were allowed, but the rule of allowance was afterwards set aside on the ground of the bail having committed perjury in justifying, it was holden that they could not afterwards render; *Brown v. Jennings*, 2 *B. & A.* 768; but if they had been added bail, the principal might have been rendered by the bail originally put in. *R. v. Sh. of Middlesex*, 6 *Bing.* 251, and see *R. v. Sh. of Essex*, 5 *T. R.* 633. Any man therefore may be put in as bail for this purpose; *Bell v. Gate*, 1 *Taunt.* 162; even an attorney, or attorney's clerk. *R. G. H.* 2 *W.* 4, s. 13.

Bail to render, may be put in by the defendant; see *Brookes v. Warren*, 2 *W. Bl.* 1273; or by his bail to the sheriff, with or without his assent; or by his bail above; *Davidson v. Fowler*, *H.* 1820, *MS.* 2 *Chit.* 74; or by the sheriff, with or

without his assent, even although he have not taken a bail bond, *R. v. Butcher, Peake*, 169. *Hamilton v. Jones*, 6 Bing. 28, provided the defendant have then failed to put in bail in due time. *Taylor v. Evans*, 1 Bing. 367. And for the purpose of rendering him, the bail may take him, if he be at large; and any person may lawfully assist them in doing so. *Weyell v. Stowe*, 3 Taunt. 425. Or if he be in custody, they may in most cases have a *habeas corpus* to bring him up, to render him. See *ante*, p. 208. The render must be to the prison of the court where the recognizance of the bail was taken; *Fisher v. Branscombe*, 7 T. R. 355; but if the record be removed from that court into another, the render may be to the prison of the latter court. *Sherratt v. Floyer*, 2 Bing. 18.

Upon application at a judge's chambers, the judge's clerk will take out the committitur, and get it signed by the judge; but in the Queen's Bench, in order, to enable him to do so, a memorandum of the state of the cause must be delivered to him, as thus: if before declaration, the sum sworn to on the arrest, must be stated; if after declaration, add "declaration filed or delivered," "issue joined" or "interlocutory judgment signed," as the case is: if after final judgment, state the debt and damages, or damages. R. E. 8 G. 3, K. B. The defendant is then delivered to the tipstaff, together with the committitur. In the Common Pleas and Exchequer, you get the officer who has the bail book to attend at the time of the render, and an exoneretur will then be entered; but in the Queen's Bench this is done otherwise, thus: after notice of render has been served, an affidavit of service is made, and upon that being filed with the officer who has the bail piece, he will give it to you; you then take the bail piece to the master, who will enter an exoneretur upon it; you then file the bail piece with the officer who signs the writs; and lastly you make an entry of the render in the marshal's book, kept in the office of the clerk of the judgments. This affidavit of service, and the entry in the marshal's book, however, are not necessary to the validity of the render. *R. v. Sh. of Middlesex*, 2 B. & A. 607. And even if the exoneretur be not entered, and proceedings on that account be taken against the bail, the court will give leave to enter it *nunc pro tunc*. *Weaver v. Chandler, Say*, 7. and see *Webb v. Harvey*, 2 T. R. 757.

Notice of render should be given to the plaintiff's attorney or agent forthwith, *R. T. 1, A. K. B.*, and in strictness, before the time for rendering shall have expired; for otherwise the plaintiff may proceed against the bail or the sheriff. But where the render itself is made in time, if from any neglect of the defendant in giving notice of it, the plaintiff proceed against the bail, the court will stay the proceedings on payment of costs; *Lepine v. Barratt*, 8 T. R. 222. *Thorne v. Hutchinson*, 3 B. & C. 112. and see *Smith v. Lewis*, 16 East,



212; and they have done this, even after execution executed in an action against the bail, *Thorne v. Hutchinson*, *supra*, and after an attachment against the sheriff, *R. v. Sh. of Middlesex*, 2 D. & R. 225, and even after an action for an escape was commenced. *R. v. Sh. of Derbyshire*, 5 B. & C. 244. As to proceedings, after notice of render, see *Byrne v. Aguilar*, 3 East, 306.

*Render to the county gaol, in what cases.*] By stat. 11 G. 4, and 1 W. 4, c. 70, s. 21, a defendant, who shall have been holden to bail on any mesne process, issued out of any of the superior courts of record, may be rendered in discharge of his bail to the common gaol of the county in which he was so arrested. The palace court is not a superior court within the meaning of this section; nor can a defendant, arrested under process from it, although the cause had been removed into the court of Queen's, Bench, be rendered to the county gaol, under this statute. *Scaith v. Brown*, 5 Dowl 412. But Dover Castle, it seems, may be deemed a county gaol, within the meaning of the act. *Stride v. Hill*, 4 Dowl. 709.

And by sect. 22, a defendant, in custody of the gaoler of the county gaol of any county of England or Wales, by virtue of any proceeding out of any of the superior courts of record, may be rendered in discharge of his bail in any other action depending in any of the said courts.

*When and how.*] This statute makes no alteration whatever in the time for rendering; and therefore the render in this case must be made within the time already mentioned. *ante*, p. 209.

In order to make the render, "the defendant or his bail or one of them, shall, for the purpose of such render, obtain an order of a judge of one of the superior courts at Westminster, and shall lodge such order with the gaoler of such county gaol, [and at the same time render the defendant to his custody]; and a notice in writing of the lodgment of such order, and of the defendant's being actually in custody of such gaoler by virtue of such order, signed by the defendant or the bail or either of them, or by the attorney or agent of any or either of them, shall be delivered to the plaintiff's attorney or agent; and the sheriff, or other person responsible for the safe custody of debtors in such county gaol, shall, on such render being so perfected, be duly charged with the custody of such defendant; and the said bail shall be thereupon wholly exonerated from liability as such. 11 G. 4, & 1 W. 4, ss. 21, 22.

In applying for the judge's order, a memorandum should be furnished to the judge's clerk, of the name of the cause, the stage in which it is, the amount of the debt indorsed on the writ, or the debt or damages, &c. recovered by the verdict, in what county the defendant was arrested, whether now in cus-

today or not, and upon whose application the order is required. In the Exchequer, this is now required by R. Ex. M. 1 W. 4, s. 12, 13.

## SECTION IX.

*Proceedings against traders subject to the bankrupt laws.*

In consequence of imprisonment for debt upon mesne process, being in most cases abolished, as has been already stated, it became necessary to substitute some clause for that section of the bankrupt act (6 G. 4, c. 16, s. 5), by which a trader was deemed to have committed an act of bankruptcy, if he lay in prison for 21 days after an arrest or detainer for debt. It has accordingly been enacted that "if any single creditor, or any two or more creditors being partners, whose debt shall amount to 100*l.* or upwards, or any two creditors whose debts shall amount to 150*l.* or upwards, or any three or more creditors whose debts shall amount to 200*l.* or upwards, of any trader within the meaning of the laws now in force respecting bankrupts, shall file an affidavit or affidavits in Her Majesty's courts of bankruptcy, that such debt or debts is or are justly due to him or them respectively, and that such debtor, as he or they verily believe, is such trader as aforesaid, and shall cause him to be served personally with a copy of such affidavit or affidavits, and with a notice in writing, requiring the immediate payment of such debt or debts; and if such trader shall not, within 21 days after personal service of such affidavit or affidavits and notice, pay such debt or debts, or secure or compound for the same to the satisfaction of such creditor or creditors, or enter into a bond, in such sum and with such two sufficient sureties as a commissioner of the court of bankruptcy shall approve of, to pay such sum or sums as shall be recovered in any action or actions which shall have been brought or shall thereafter be brought for the recovery of the same, together with such costs as shall be given in the same, or to render himself to the custody of the gaoler of the court in which such action shall have been or may be brought, according to the practice of such court, or within such time and in such manner as the said court or any judge thereof shall direct, after judgment shall have been recovered in such action, every such trader shall be deemed to have committed an act of bankruptcy on the 22d day after service of such affidavit or affidavits and notice, provided a fiat in bankruptcy shall issue against such trader, within two calendar months from the filing of such affidavit or affidavits, but not otherwise. 1 Vict. c. 110, s. 8.

*Affidavit.*] The act makes no mention of the person, before whom the affidavit is to be sworn; but if it is to be implied

from the words of the act, as above given, that it shall be sworn in the same manner as the affidavit of a petitioning creditor in ordinary cases of bankruptcy, that is to say, before a master in chancery in town, or a master extraordinary in chancery in the country. And indeed it has since been so decided. The following may be the form :

*A. B. of — street in the city of London, merchant, maketh oath and saith, that G. H. of — street in the said city of London, grocer, is justly and truly indebted unto him this deponent [and to C. D. his partner] in the sum of — pounds and upwards; and the said A. B. saith that he verily believes that the said G. H. is a trader within the meaning of the laws now in force respecting bankrupts.*

The sum mentioned in this affidavit, should be about the sum actually due, as in ordinary affidavits to hold to bail, and not merely the exact sum required by the statute "and upwards," as in the usual affidavit of a petitioning creditor.

If the affidavit be made by two or more creditors, it may be thus : *A. B. of — merchant, C. D. of — grocer, and E. F. of — carpenter, severally make oath and say, and first this deponent A. B. for himself saith that G. H. of —, grocer, is justly and truly indebted unto him this deponent in the sum of —; and this other deponent C. D. for himself saith that the said G. H. is justly and truly indebted unto him this deponent in the sum of —; and this other deponent E. F. for himself saith that the said G. H. is justly and truly indebted unto him this deponent in the sum of —; and these several deponents severally further say, that they verily believe that the said G. H. is a trader within the meaning of the laws now in force respecting bankrupts.*

*Notice.] The notice may be in this form : Mr. — take notice that I have this day filed in Her Majesty's court of bankruptcy, an affidavit of the debt due from you to me, a copy of which is hereunto annexed, and I hereby require you immediately to pay me the said debt amounting to —l. Dated, &c.*

*Bond, how discharged.] The bond being in the alternative, to pay or render, the sureties may get rid of their liability by rendering the defendant, in the same manner as bail to the action may do. This render may be either according to the practice of the court in other cases, or within such time, and in such manner, as the court or a judge thereof shall direct, after judgment shall have been recovered in the action. These words "after judgment," &c., refer to the latter mode merely; and therefore a render according to the practice of the court, may be before judgment, *Owston v. Coates*, 10, *Ad. & El.* 193, 8 *Law. J.* 201 *qb.*, and the court will allow of it, even although the condition of the bond may not have been in exact conformity with the statute. *Saunderson et al. v. Parker*.*

10 *Law J.* 236 *qb.* Notice of the tender must of course be given; but it is not necessary to make an affidavit of the service of it. *Id.*

So, if the bond be in any other manner satisfied, the court upon application will order it to be delivered up to be cancelled. *Wilson v. Firth*, 10 *Law J.* 292 *qb.* per Coleridge J.

# SECTION X.

## *Removal of causes from inferior courts.*

### 1. *Before judgment.*

*In what cases.]* It is not intended here to treat of the removal of a replevin cause from an inferior court; that will be fully considered when we come to treat of the action of replevin. We shall confine our attention here, to the removal of causes by writ of *certiorari*, into the superior courts, for the purpose of proceeding in them there to judgment and execution. Formerly, a *habeas corpus* lay, to remove proceedings from an inferior court, where the defendant was actually or virtually in the custody of the court below; see *Mitchell v. Mitchison*, 1 B. & C. 513. *Palmer v. Forsyth*, 4 B. & C. 401; but as a defendant cannot now be holden to bail in an inferior court, it follows that the cause can no longer be removed by *habeas*, but must be removed, if at all, by *certiorari*. Even ejectment, brought in an inferior court, is properly removable by this writ. *Doe v. Dring*, 1 B. & C. 253. *Patterson v. Eades*, 3 B. & C. 550. But the court will not grant it to the courts of the counties palatine, and formerly not to the courts of great session in Wales, unless upon special cause, and under particular circumstances. *Zinc v. Langton*, 2 Doug. 749. *Williams v. Thomas*, 2 Doug. 751 n. *Pickering v. Bp. of Chester* 6 D. & R. 489. *Jones v. Davies*, 1 B. & C. 143. *Paterson v. Reay*, 2 D. & R. 177. In all other cases it is grantable as a matter of course, *Landens v. Shiel*, 3 Dowl. 90, where the inferior court is a court of record. See *Edwards v. Bowen*, 7 D. & R. 709, 5 B. & C. 206.

*In what cases not.]* In cases where the *certiorari* is taken away by the express words of a statute, of course the proceedings cannot be removed. See *Fox v. Veale*, 8 Mees. & W. 126.

If the steward or judge of the inferior court be a barrister of three years' standing, and the debt or damages laid or thing demanded in the declaration do not amount to 5*l.*, the cause shall not be removed. 21 J. 1, c. 23, s. 4, 6. See *Franks v. Quinsee*, 7 Dowl. 607.

It cannot be removed after final judgment, except for the purpose of suing out a *ſ. fa.* or *ca. sa.* out of the jurisdiction of the inferior court, and which we shall consider presently. *Walker v. Gann*, 7 D. & R. 769; and see *Paterson v. Reay*, 2 D. & R. 177. By stat. 42 El. c. 5, the writ must be delivered to the court below, before any of the jury are sworn; see *Laudens v. Sheil*, 3 Dowl. 90; and by stat. 21 J. 1, c. 23, s. 2, before issue or demurrer joined, if it be joined within six weeks after the arrest or appearance of the defendant: otherwise the cause shall not be removed. See *Laverack v. Bill*, 6 Dowl. 111, S. C. nom. *Laverack v. Bean*, 3 Mees. & W. 62. In one case it is laid down that a cause cannot be removed after judgment by default; *Wyatt v. Markham, Barnes*, 221; but in two other cases, where the cause was removed even after notice of inquiry, but before inquiry, the court refused to send it back by *procedendo*. *Cox v. Hart*, 2 Burr. 758. *Godley v. Madden*, 6 Bing. 433. At all events, it is too late to remove it, after a writ of inquiry has been executed. *Smith v. Stocking*, 1 Har. & W. 194.

Also, where the cause of action does not amount to 20*l.* exclusive of costs, the cause shall not be removed from an inferior court, unless the defendant with two sufficient sureties enter into a recognizance there in double the amount, conditioned for the payment of the debt or damages and costs, in case judgment shall pass against him. 7 & 8 G. 4, c. 71, s. 6. 19 G. 3, c. 70, s. 6. The sum laid in the declaration as the debt or damages, and not the sum actually due, &c., is deemed the amount of the cause of action within the meaning of this statute. *Attenborough v. Hardy*, 2 B. & C. 802. *Brady v. Vears*, 5 Dowl. 416. And the statute is not confined to debts, but extends to actions of trover, *Furnish v. Swann*, 10 B. & C. 458, actions of slander, *Lee v. Goodlad*, 4 D. & R. 350, and the like, where the damages laid are under 20*l.*

If the cause be removed, when it ought not, the mode of objecting to it is by applying to the court for a rule *nisi* for a *procedendo*. And if once properly remitted to the court below, the cause can never afterwards be removed into the court above. 21 J. 1, c. 23, s. 3. See *Dixon v. Heslop*, 6 T. R. 366, 365. *Glynn v. Hutchinson*, 3 Dowl. 529. *Lewes v. Hutchinson*, 1 Cr. M. & R. 766.

*Return of the writ.*] In obedience to the writ of *certiorari*, the record itself, and not merely a transcript or copy of it, must be sent to the court above. *Palmer v. Forsyth*, 4 B. & C. 401.

*Appearance.*] Formerly, when causes were removable by *habeas*, the defendant in bailable actions was obliged to put in and perfect bail; and the plaintiff might compel him to do so.

by obtaining and serving a rule for a *procedendo*. And in like manner now, if the defendant do not enter an appearance, the plaintiff may obtain a similar rule, to compel him.

*Declaration.*] The plaintiff is not bound to follow the cause into the superior court, nor can he be nonprossed for not declaring there. *Clark v. Dickson*, 3 M. & S. 93. *Clark v. Mayor of Berwick*, 4 B. & C. 649. The cause, however, remains in court for one year from the return of the writ, for all purposes; *Norrish v. Richards*, 5 Nev. & M. 268, 1 Har. & W. 437; and the plaintiff may, if he will, declare at any time within that period, *Id.*, if the defendant do not previously rule him to declare. This rule may be given "within four days after the end of the term in which the writ is returned;" *R. G. H.* 2 W. 4, s. 37, and see *Id.* s. 38; and if the plaintiff do not declare then within the second term inclusive after appearance entered, the defendant may afterwards refuse to receive the declaration from him. See *Id.* and *Barnes*, 90. *Stourbridge v. Walker*, 1 Str. 631.

The Uniformity of Process Act (2 W. 4, c. 39) does not extend to causes removed from inferior courts; *Id.* s. 19; nor do the new rules as to pleading. And therefore it seems that the declaration in this case must still be in the old form. See *Dod v. Grant*, 1 Har. & W. 711.

The other proceedings in the cause are the same as in ordinary cases.

## 2. Removal of causes after judgment.

*By writ of error, &c.*] If the inferior court be a court of record, acting according to the course of the common law, a writ of error lies from it to the court of Queen's Bench; but if it act in a summary way, or proceed in a manner differing from the course of the common law, the record must be brought before a superior court to be rectified, not by writ of error, but by *certiorari*. 2 *Saund.* 101, a. If, however, the inferior court be not a court of record, its proceedings may be brought before the court of Common Pleas, not by writ of error or *certiorari*, but by writ of false judgment.

*For the purpose of execution.*] Formerly, if judgment were obtained in an inferior court, and the unsuccessful party were not found within the jurisdiction, and had no property within it, the judgment could not be executed, although the party had property, or was openly residing, elsewhere. And it is doubtful whether this is as yet remedied with respect to judgments for defendants. See *Batten v. Squires*, 4 Dowl. 53. But

by stat. 19 G. 3, c. 70, s. 4, where final judgment is given in an inferior court of record, it shall be lawful for any of the courts of record at Westminster, upon affidavit "of such judgment being obtained, and of diligent search and inquiry having been made after the person of the defendant or his effects, and of execution having issued against such person or effects, and that they are not to be found within the jurisdiction of the inferior court," to cause the record to be removed into such superior court, and to issue writs of execution thereupon to the sheriff of any county or place, against the defendant's person or effects, in the same manner as upon judgments in the said courts at Westminster. The amount of the judgment, or of the original debt or damages, in such a case, is immaterial. *Knowles v. Lynch*, 2 Dowl. 623. Where the defendant had rendered in discharge of his bail in the court below, but before he could be charged in execution he was removed by *habeas* to the Fleet Prison, the court of Common Pleas granted a *certiorari*, under this statute, to bring up the record, in order to charge him in execution upon it. *Jordan v. Cole*, 1 H. Bl. 532. The statute, however, does not extend to judgments in ejectment; *Doe v. Shipley*, 2 Dowl. 408; nor to judgments upon foreign attachments in the mayor's court of London, against the garnishee, *Bulmer v. Marshall*, 5 B. & A. 821, the statute being confined to cases where the proceedings below are similar to those in the court above. *Per Abbot, C. J.* *Id.* 823. The writ cannot regularly be obtained, without motion to the court, see *Rouell v. Breedon*, 3 Dowl. 324, or application to a judge at chambers, and upon production of the affidavit above mentioned; but the rule is absolute in the first instance. *Pawsey v. Goodey*, 3 Dowl. 605. *Knowles v. Lynch*, 2 Dowl. 623.

The above statute was extended to the counties palatine by stat. 32 G. 3, c. 68, s. 1. But as to the county palatine of Lancaster, this is at present regulated by stat. 4 & 5 W. 4, c. 62, s. 31; by which it enacted, that if the plaintiff or defendant remove his person or goods out of the jurisdiction, any of the courts at Westminster, upon a certificate from the prothonotary of the court below or his deputy, of the amount of the judgment, to issue a writ of execution against the person or goods of the party, for the amount of the judgment and the costs of the writ and certificate, to the sheriff of any county, &c. There must also be an affidavit in this case, similar to that required by stat. 19, G. 3, c. 70, abovementioned; *Duckworth v. Fogg*, 4 Dowl. 396; but it seems that it will be sufficient if it state a search for the person or goods of the party, and the court, or, I believe, a judge at chambers, will thereupon grant the execution against the person or goods accordingly. *Lord v. Cross*, 4 Nev. & M. 30, 3 Dowl. 4.

## CHAPTER III.

*Proceedings from declaration to plea.*

## SECTION I.

*Declaration.*1. *Form of it.*

If your declaration is to be special, or to contain any other than the common counts, or a count on a bill of exchange or promissory note, lay proper instructions before counsel or a pleader to draw it. Afterwards engross it upon plain paper, and deliver it, or file and give notice of it, as shall presently be directed. The common forms of declarations will be found in the Appendix.

In these, and indeed in all declarations, great attention must be paid to the following particulars:

1. The declaration must be intituled in the proper court; *R. G. M. 3 W. 4, s. 15*; otherwise the court will set it aside for irregularity. *Ripling v. Watts*, 1 *Har. & W.* 525, 4 *Dowl.* 290.

2. It must bear date on the same day on which it is delivered or filed; *R. G. M. 3 W. 4, s. 15*; otherwise the court will set it aside for irregularity. See *Newnham v. Hanny*, 5 *Dowl.* 259.

3. In local actions, the venue must be laid in the proper county, otherwise the plaintiff will be nonsuit. But a declaration laying the venue in a different county from that mentioned in the process, is no irregularity. *R. G. H. 2 W. 4, s. 40*.

4. It must correspond with the writ, as to the parties. Where the process was at the suit of two plaintiffs, and the declaration at the suit of one, the court set it aside for irregularity. *Rogers v. Jenkins*, 1 *B. & P.* 383. But where the writ is against two or more defendants, there is no objection to the declaration being against one only; *Coldwell v. Blake*, 2 *Cr. M. & R.* 249; *Stables v. Ashley*, 1 *B. & P.* 49; but you cannot afterwards declare against the other, in a separate action. *Pepper v. Whalley*, 2 *Dowl.* 821, 1 *Bing. N. C.* 71, and see *R. G. M. 3 W. 4, s. 1*. Also if, upon a writ against A. and another against B, there be a joint declaration against both, the court will set aside the declaration for irregularity; *Haigh v. Conway*, 15 *East*, 1; particularly as now the writ must contain the names of all the defendants. *R. G. M. 3 W. 4, s. 1*. See *Christie v. Walker*, 1 *Bing.* 48 *semb. cont.* If the writ be against the



defendant and an appearance entered for him by the name of J, and the plaintiff declare against him by the name of R, sued by the name of J, the court will set aside the declaration for irregularity. *Delaney v. Cannon*, 10 East, 328; and see *Gould v. Barnes*, 3 Taunt. 504. *Oakley v. Giles*, 3 East, 167. *Doe Butcher*, 3 T. R. 611. *Symmers v. Wason*, 1 B. & P. 105. If the writ be against a defendant by the name of Richard, and the declaration by the name of Joseph, the court will set aside the declaration for irregularity; but if the defendant do not object to it, and judgment by default be also signed against him as Joseph, he cannot move to set aside the judgment, because it is warranted by the declaration; nor the declaration, because it is too late to object to it. *Kitchen v. Roots*, 8 Dowl. 232, 9 Law, J. 5, ex. And where the declaration stated the name of the plaintiff as Henry H. Lindsay, having the initial merely for the second christian name, the court held it to be immaterial. *Lindsay v. Wells*, 3 Bing. N. C. 777. Formerly a plaintiff, upon general process, might declare in *auter droit*, as executor, &c., *Watson v. Pilling*, 6 Moore, 66, or *qui tam*; *Lloyd v. Williams*, 2 W. Bl. 722; and the court of Exchequer have holden that this may still be done. *Knowles v. Johnson*, 2 Dowl. 653. But upon process in *auter droit* or *qui tam*, the plaintiff cannot declare in his own right. See *Anon.* 1 Dowl. 97. *Douglas v. Irlam*, 8 T. R. 416.

5. It must correspond with the writ, as to the cause of action. Where the writ was on promises, and the declaration in case, the court set aside the declaration for irregularity. *Scrivener v. Watling*, 1 Har. & W. 8. *King v. Skiffington*, 1 Cr. & M. 363. And the same, where the writ was on promises, and the declaration in covenant; *Ward v. Tummon*, 4 Nev. & M. 876; where the writ was in trespass, and the declaration on promises; *Edwards v. Dignam*, 2 Cr. & M. 346; where the writ was in case, and the declaration in trespass. *Thompson v. Dicus*, 1 Cr. & M. 768. But where the writ was on promises, and the declaration stated that the defendant was summoned to answer the plaintiff in a plea, without saying "on promises," but was in other respects a good declaration in assumpsit, it was holden to be sufficient. *Straughan v. Buckle*, 1 Har. & W. 519. So where the writ was in debt, and the declaration commenced in debt, but concluded in assumpsit, the court held this to be a subject of demurrer, and not of a motion to set aside the declaration for irregularity. *Rotton v. Jeffery*, 1 Dowl. 637. So where the writ was "in a special action," and the declaration on promises, the court refused to set aside the declaration, saying that the only fault was in the writ. *Moore v. Archer*, 4 Dowl. 214. And where the writ, which was on promises, was indorsed for £8 and costs, and that sum not being paid, the plaintiff declared in assumpsit, not only for the £8, but added a special count for unliquidated damages on a dif-

ferent ground of action, the court held that he might do so. *Bowditch v. Slaney*, 1 *Hodg.* 224. Formerly where there was a variance between the declaration and process in the cause of action, the court in bailable actions would have entered an *exoneretur* upon the bail piece, or discharged the defendant upon a common appearance; 2 *Saund.* 72 a; but now they will only set aside the declaration for the irregularity. *Ward v. Tummon*, 4 *Nev. & M.* 876. Formerly also if the declaration was for a different cause of action from that stated in the affidavit to hold to bail, the court would discharge the defendant on a common appearance, or enter an *exoneretur* on the bail piece; 2 *Saund.* 72 a; but it seems from the case last mentioned, that they would not do so now, *See Gray v. Harvey*, 1 *Dowl.* 114, particularly as the *capias* is now merely a collateral proceeding, and not strictly process in the action.

6. Special venue must not be stated in the body of the declaration; *R. G. T.* 4 *W.* 4, s. 8; otherwise a judge at chambers will order it to be struck out; but it is not the subject of a demurrer. *Harper v. Chumneys*, 2 *Dowl.* 680. *Fisher v. Snow*, 3 *Dowl.* 27. *Townsend v. Gurney*, 1 *Cr. M. & R.* 590.

*Notice to plead indorsed.*] There must be a notice to plead indorsed on the declaration, even although it be filed; otherwise the plaintiff cannot sign judgment for want of a plea, without giving such a notice on a separate paper, even although there be a rule to plead, and demand of plea. *Heath v. Rose*, 2 *New Rep.* 223. The indorsement is in this form: "The defendant is to plead hereto in [four," or "eight] days, otherwise judgment."

*Striking out counts.*] By *R. G. H.* 4 *W.* 4, s. 5, "several counts shall not now be allowed, unless a distinct subject matter of complaint is intended to be established in respect of each;" "and therefore counts founded on one and the same principal matter of complaint, but varied in statement, description or circumstances only, are not to be allowed. *Id.* This, however, "is not to be considered as precluding the plaintiff from alleging more breaches than one, of the same contract, in the same count." *Id.* And "where more than one count shall have been used, in apparent violation of the preceding rule, the opposite party shall be at liberty to apply to a judge, suggesting that two or more of the counts are founded on the same subject matter of complaint, for an order that all the counts introduced in violation of the rule be struck out, at the cost of the party pleading; whereupon the judge shall order accordingly, unless he shall be satisfied upon cause shown, that some distinct subject matter of complaint is bona fide intended to be established in respect of each of such counts, in which case he shall indorse upon the summons, or

state in his order, as the case may be, that he is so satisfied, and shall also specify the counts mentioned in such application, which shall be allowed." *Id.* s. 6. If at the trial the plaintiff fail in proving a distinct cause of action upon each count, there shall be a verdict against him upon the counts he shall fail to establish, and he shall be liable for the costs thereby occasioned, not merely of the pleadings, but of the evidence also; or if he obtain a verdict, the judge may certify, to deprive him of costs. *Id.* s. 7. See *Head v. Baldrey*, 11 *Ad. & El.* 906. *Dewar v. Swabey*, *Id.* 913. *Jackson v. Galloway*, 8 *Law J.* 29 *cp.* *Plummer v. Hudson*, 9 *Id.* 176 *qb.* *Lawrence v. Stephens*, 3 *Dowl.* 777, 1 *Gale*, 164. *Doe d. Overseers of Llandesilio v. Roe*, 4 *Dowl.* 222. *Jenkins v. Treloar*, *Id.* 690. *Roy v. Bristow*, 2 *Mees. & W.* 241. *James v. Bourne*, 4 *Bing. N. C.* 420. *Weeton v. Woodcock*, 7 *Id.* 384. *Thornton v. Whitehead*, 1 *Mees. & W.* 14. *Vaughan v. Glenn*, 5 *Id.* 577. *Cholmondeley v. Payne*, 3 *Bing. N. C.* 708. The application to strike out counts must be made to a judge at chambers, in the first instance, *Ward v. Graystock*, 4 *Dowl.* 717, unless some intricate point of law be involved in it, such as to warrant an application to the court. See *Ov. of Llandesilio v. Roe*, *supra*.

Also, where the declaration contained 98 counts, upon as many notes of a country banker, of 1*l.* each, the court upon application struck them all out but one and a count upon an account stated, the defendant consenting that the other notes might be given in evidence under the count upon an account stated, and consenting also not to bring a writ of error. *Car-mach v. Gundry*, 3 *B. & A.* 272.

### 1. When to declare.

No declaration can be delivered or filed "between the 10th day of August and the 24th day of October;" 2 *W.* 4, c. 39, s. 11; but it may at any other period of the year. On the other hand, by R. G. H. 2 *W.* 4, s. 35, "a plaintiff shall be deemed out of court, unless he declare within one year after the process is returnable." And process, I think, would be deemed to be returnable within the meaning of this rule, on the day on which it is served.

Formerly a plaintiff might declare *de bene esse*, (that is, conditionally until bail perfected or appearance entered,) in all personal actions, bailable or nonbailable, at any time after the return of the writ, and before time for putting in bail or for entering a common appearance had expired. But the Uniformity of Process Act, 2 *W.* 4, c. 39, by appointing eight days from the execution of the *capias* or service of the writ of summons, as the time for putting in bail and appearing to

these writs respectively, and prohibiting proceedings in the action in the mean time, had the effect of abolishing this mode of declaring. See *Fish v. Palmer*, 2 Dowl. 460. It was afterwards revived in bailable actions, by R. G. M. 3 W. 4, s. 11; but as that rule does not extend to the cases in which a defendant may now be holden to bail, the power of declaring *de bene esse* no longer exists.

Immediately upon an appearance being entered by the defendant, the plaintiff may deliver his declaration, even before the expiration of the eight days from the service of the writ; *Morris v. Smith*, 2 Cr. M. & R. 314; or he may file it absolutely and give notice of it, if the appearance were entered by himself in pursuance of the statute. And the plaintiff must declare within a year from the service of the writ, otherwise (as we have already seen, *ante*, p. 224,) the cause will be out of court. R. G. H. 2 W. 4, s. 35. And in the mean time, if the defendant serve a written demand of declaration upon the plaintiff, his attorney or agent, the plaintiff must declare within four days from the making of the demand, otherwise the defendant may sign judgment of *nonpros*; see R. G. T. 1 W. 4, s. 8, and see *post*, p. 228, title "*Nonpros*;" and if the plaintiff be not then ready to declare, he must obtain time to declare, as shall be mentioned presently. If a writ of summons be issued against two, and one be served, the other not, the plaintiff cannot in that case declare against one, and afterwards declare against the other when he shall be arrested or served; see *Knight v. Parker*, 2 W. Bl. 259; and in that case also, it may be necessary to obtain time to declare. See *Morton v. Grey*, 9 B. & C. 544.

If for any of these reasons you want time to declare, obtain a rule for that purpose from the proper clerk at the master's office, by which you may obtain time from the beginning to the last day of the term, and from the end of one term until the beginning of the next. But in order to put an end to this delay, if there be no real cause for it, the defendant, upon obtaining an office copy of the last rule, and counsel's signature to a motion paper, may obtain a rule upon the plaintiff peremptorily to declare in the cause, and which may be absolute in the first instance; R. G. H. 2 W. 4, s. 39; after which the plaintiff, if he wish further time, must obtain it of the court, upon a sufficient affidavit showing the necessity for it. See *Richardson v. Pollen*, 1 Hodg. 75.

### 3. How to declare.

If the appearance be entered for the defendant by the plaintiff, in pursuance of the statute, the declaration must be filed and notice given. But if the appearance be entered by the

defendant, the declaration must be delivered to the defendant's attorney or agent, or to the defendant himself if he have appeared in person; and it must be delivered on the very day on which it bears date, *R. G. M. 3 W. 4, s. 15*, otherwise the court will set it aside for irregularity. *See Newkham v. Hanmy, 5 D. & R. 259*. Where the defendant entered an appearance, after the filing of the declaration but before the service of the notice, the court upon application set aside the declaration; because a declaration is deemed to be filed only from the time of serving the notice, and at that time the defendant had appeared. *Weddle v. Brazier, 1 Cr. & M. 69*. The notice may be in the form following:—

*In the [§c.*

*Between, §c.*

*Take notice, that a declaration against you, bearing date the ——— day of ——— instant, is filed at the master's office of the court of ———, at the suit of the above-named plaintiff, in an action [on promises]; and unless you appear and plead thereto in [four, "or" eight] days from the date hereof, judgment will be signed against you by default.*

*Yours, §c. A. B.*

*To Mr. ———,*  
*the above-named defendant. }* *Plaintiff's attorney, [or agent].*

In this notice, it is not necessary to express the amount of the damages. *R. G. H. 2 W. 4, s. 41*. But it must state the nature of the action. *Sams v. Culham, 9 B. & C. 370. Cooke v. Johnson, 1 Dowl. 247. Gravis v. Wise, 2 Wils. 84*. And if the notice in this respect vary from the writ, the defendant may move to set aside the declaration for irregularity, and is not obliged to confine his rule to setting aside the notice merely. *Robinson v. Eorington, 9 Dowl. 107*.

This notice must be served upon the defendant, either personally, or by leaving it for him at his place of residence. *See Rolfe v. Brown, 3 Dowl. 628*. But "where the residence of a defendant is unknown, notice of declaration may be stuck up in the office, but not without previous leave of the court," *R. G. H. 2 W. 4, s. 49. See Layton v. Mason, 6 Dowl. 275*, or of a judge. The residence here meant, is the present residence of the defendant. Where after the commencement of the action the defendant changed his residence, and it was not known where he was gone to, and the notice of declaration was left for him at his late residence, and also stuck up in the office, but without any previous application to the court: the court held the service to be bad; although if previous application had been made, they would have granted it. *Troughton v. Craven, 3 Dowl. 436*. The court however before they grant

such leave, will require to be satisfied that due diligence has been used to find out the defendant's place of residence. See *Fry v. Rogers*, 2 Dowl. 412. *Heming v. Duke*, Id. 637. Where the notice was served at a distance of 150 miles from London, on the very day the declaration was filed, it was holden to be unobjectionable on that ground; *Rook v. Sherwood*, 4 Dowl. 363; but in such a case, to shew the proceeding to be regular, it should in strictness be shewn at what time of the day the declaration was filed, and at what time the notice was served. *Id.* The notice cannot be served on a Sunday. *Morgan v. Johnson*, 1 H. Bl. 628. The declaration is deemed to be filed, only from the time at which the notice is served. *Hutchinson v. Brown*, 7 T. R. 298. *Widdie v. Brazier*, 1 Cr. & M. 69.

*Particulars of demand.*] If the declaration contain counts in indebitatus assumpsit, or debt on simple contract, it is ordered by R. G. T. 1 W. 4, s. 6, that with the declaration, if delivered, or with the notice of declaration if filed, "the plaintiff shall deliver full particulars of his demand under those counts, where such particulars can be comprised within three folios; and where the same cannot be comprised within three folios, he shall deliver such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios; and to secure the delivery of particulars in all such cases, it is further ordered, that if any declaration or notice shall be delivered without such particulars or such statement as aforesaid, and the judge shall afterwards order a delivery of particulars, the plaintiff shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver." The only effect of not delivering particulars with the declaration or notice, under this order, is, that the plaintiff will not be entitled to costs for any particulars he may afterwards deliver under a judge's order. And therefore where the particulars delivered with the declaration were intituled in a wrong court, and the plaintiff in three days afterwards delivered other particulars properly intituled, the court held that this did not extend the time for pleading, but that the plaintiff was correct in signing judgment at the expiration of the time for pleading, reckoned from the delivery of the declaration. *Jones v. Fowler*, 1 Gale, 256.

#### 4. Irregularities in, how and when objected to.

The irregularities which usually occur in declarations, have been already noticed, *ante*, p. 221. Where one of two defendants was outlawed, and the plaintiff declared against the other

it was holden that the latter could not object to the declaration, for an irregularity in the outlawry of the other defendant. *Solly v. Forbes*, 2 *Moore*, 90. If the irregularity occur in vacation, the application to set aside the declaration or other proceeding, must be made to a judge at chambers; the defendant cannot wait until the term, to make it. *Hinton v. Stevens*, 1 *Har. & W.* 521. And *Littledale, J.* ruled, that it must be made in all cases within four days, Sunday included, unless it be the last of the four. *Id.* See *Newnham v. Hanny*, 5 *Dowl.* 259. *Brande v. Rich*, 8 *Taunt.* 557. *Minster v. Coles*, 2 *Chit.* 237. Or at all events it must be made within the time for pleading. *Kitchen v. Brooks*, 5 *Mees. & W.* 522. If the application be made in time to a judge at chambers in vacation, and he refuse an order, the defendant, by obtaining time to plead, does not waive the objection, and he may afterwards on the first day of term make the like application to the court. *Woodcock v. Kilby*, 1 *Gale*, 405. See *Davis v. Owen*, 1 *B. & P.* 342. In order to set aside a declaration, on the ground that the defendant was never served with process, it will not be sufficient for him simply to swear that he was not served, but his affidavit must go on to state that the process never came to his knowledge. *Giles v. Hunning*, 6 *Dowl.* 325. *Phillips v. Ensell*, 1 *Cr. M. & R.* 374.

#### 5. *Nonpros for not declaring.*

*In what cases.*] Formerly where the defendant entered an appearance or perfected his bail as of the term in which the writ was returnable, if the plaintiff did not declare before the end of the next term, the defendant might sign judgment of *nonpros*. Although the time thus given to declare was applicable only to actions by bill and by original writ, and actions are not now so commenced, yet it has lately been decided by *Alderson B.*, that a plaintiff has the whole of the term next after the appearance has been entered, to declare in; within which time the defendant cannot sign judgment of *nonpros*. *Foster v. Pryme*, 9 *Dowl.* 749, 10 *Lau.* J. 419, *ex.* But by *R. G. T.* 1 *W.* 4, s. 8, "no judgment of *nonpros* shall be signed for want of a declaration, replication or other subsequent pleading, until four days next after a demand thereof shall have been made in writing upon the plaintiff, his attorney or agent, as the case may be." See *Teulon v. Grant*, 5 *Dowl.* 153. And if the plaintiff be not ready to declare within these four days, he may obtain the usual rule for time to do so, as directed, *ante p.* 225. On the other hand, a plaintiff may declare at any time within a year, if judgment of *nonpros* be not signed. *Penny v. Harvey*, 3 *T. R.* 123. *Sherson v. Hughes*, 5 *T. R.* 35. *West v. Radford*, *Burr.* 1452. *Orley v. Lee*, 2 *T. R.* 112, even although a declaration have been demanded, and the

four days have expired. But by R. G. H. 2 W. 4, s. 35, "a plaintiff shall be deemed out of court, unless he declare within one year after the process is returnable," and which would now probably be construed to mean, after the service of the process; after which, the plaintiff cannot declare, nor can the defendant sign judgment of *nonpros* for not declaring. *Cooper v. Nias*, 3 B. & A. 271. Nor can a defendant sign judgment of *nonpros*, after the plaintiff has given him notice that he has abandoned his writ. *Solly v. Richardson*, 6 Dowl. 774. Also, where a defendant removes a cause from an inferior court by *certiorari*, the plaintiff is not bound to follow it; and therefore a judgment of *nonpros* cannot be signed against him for not declaring in the superior court. *Clark v. Mayor of Berwick*, 4 B. & C. 649. Nor can a defendant sign judgment of *nonpros*, before he has appeared; *Anon.* 2 Chit. 37. and see *Bate v. Bolton*, 4 Dowl. 160; and in an action against several defendants, a *nonpros* cannot be signed, until all have appeared. *Palmer v. Feistel, et al.*, 2 Dowl. 507.

It may be necessary to mention, that judgment of *nonpros* cannot be signed for not declaring or replying, &c. after a declaration or replication, &c. has been actually delivered or tendered to the defendant or his attorney, although the time for declaring or replying, &c. may have expired. *Gray v. Pennell*, 1 Dowl. 120. But in a case where the defendant being in a situation to sign judgment of *nonpros* for not declaring, the plaintiff, with a view to prevent it, obtained a rule to discontinue on payment of costs; instead of discontinuing however, he afterwards delivered a declaration, and the defendant thereupon signed judgment of *nonpros*: the court deeming what had been done by the plaintiff to be a fraud upon the practice of the court, refused to set aside the judgment. *Ariel v. Barrow*, 8 Bing. 375.

*How signed.*] In the court of Queen's Bench, *make an incipitur on a roll, and also on a judgment paper*; in the Common Pleas and Exchequer, *write the judgment on plain paper: take these to the proper clerk, in the master's office, and he will sign judgment, and tax the costs.* See the forms of the judgment and execution, in the Appendix. If the action be against several defendants, the judgment must be signed by all. *Powell v. White*, 1 Doug. 169. But although the process be against several, yet if the plaintiff declare against some of them only, or even obtain a rule for time to declare against some of them, the others may sign judgment of *nonpros*, if they are in other respects in a situation to do so. *Roe v. Cock*, 2 T. R. 257. and see *Butler v. Upton*, *Id.* 259, n.

*In what cases set aside.*] If a judgment of *nonpros* be signed, where it ought not, or if there be any irregularity in the sign-



ing of it, the court upon application will set it aside for irregularity. *See Kibblewhite v. Jeffreys*, 1 *Chit.* 142. Even if the judgment be regular, the court in most cases will set it aside on payment of costs, upon an affidavit of merits or that the plaintiff had, at the time of commencing the action, and still has, a good cause of action in that suit against the defendant; *see Cortesos v. Hume*, 2 *Dowl.* 134; but they have refused to do so, in an action by a common informer. *Bennett v. Smith*, 1 *Burr.* 40.

**Costs.]** Upon signing a judgment of *nonpros*, the defendant is entitled to costs, 23 *H.* 8, c. 15. 8 *El. c.* 2. 4 *J.* 1, c. 4; *see Davies v. James*, 1 *T. R.* 371, except upon a *nonpros* in error before transcript, *Salt v. Richards*, 7 *East*, 110, and upon a *nonpros* for not entering the issue after demurrer to a plea in abatement. *Michlam v. Bate*, 8 *B. & C.* 642.

## SECTION II.

### Change of venue.

#### 1. In transitory actions, upon the usual affidavit.

**In what cases.]** Although the plaintiff, in a transitory action, may lay the venue where he pleases, yet if he lay it a county in which no part of the cause of action arose, the defendant, upon application, may in most cases have the venue changed to that county in which the whole of the cause of action happened, upon an affidavit stating the nature of the action shortly, and "that the plaintiff's cause of action, if any, arose in the county of A., and not in the county of B., as laid in the declaration, or elsewhere out of the county of A." If it omit to state that the cause of action did not arise in the county where the venue is laid, *Allen v. Griffiths*, 3 *T. R.* 495, or that it arose in the county to which the venue is sought to be changed, *Palmer v. Terry*, 2 *Dowl.* 566, or if the words "elsewhere out of the county —," be not stated in the affidavit, *Jones v. Pearce*, 2 *Dowl.* 54, or if it state that the cause of action arose partly in York and partly abroad, *Walker v. Wright*, 4 *East*, 495, and *see Henning v. Durant*, 1 *Wils.* 178, it will be insufficient. It is usually made by the defendant himself; and is more satisfactory if made by him. But it may be made by the attorney in the cause, *Biddell v. Smith*, 2 *Dowl.* 219, or by any other person who can swear to the facts.

In all transitory actions, therefore, where this affidavit can be made, the defendant may obtain a rule to change the venue, as a matter of course. To this, however, there are the fol-

lowing exceptions: actions on bills of exchange and promissory notes, *Smith v. Elkins*, 1 Dowl. 426. *Hart v. Taylor*, 3 D. & R. 164. *Shepherd v. Green*, 5 Taunt. 576, even although the bill, &c., form only a part of the cause of action; *Walthen v. Syers*, 1 Cr. M. & R. 496; debt on bond or other specialty; *Gilb. C. P.* 90. *Weatherly v. Goring*, 3 B. & C. 552; covenant for rent, &c.; *Bradly v. Adry, Barnes*, 390; and see *Maunder v. Sessions*, 1 Cr. M. & R. 86; actions on awards; *Stanway v. Hislop*, 3 B. & C. 9. *Whitburn v. Staines*, 2 B. & P. 355; actions on policies of insurance; *Smith v. Stansfeld*, 1 M'Lel. & Y. 212; or on charter parties and other written instruments, *Morris v. Hurry*, 7 Taunt. 306, under seal, see *Slade v. Treses*, 1 Cr. & M. 584, where the written instrument is declared upon, and not merely to be used as evidence; see *Pickard v. Featherstone*, 4 Bing. 39. *Roberts v. Wright*, 1 Tyr. 532. *Slade v. Trew*, Id. 532; actions for infringing patents; *Cameron v. Gray*, 6 T. R. 363. *Brunton v. White*, 7 D. & R. 103; and in actions against sheriffs for escapes, false returns, &c., 2 Salk. 669, 670, and see *Pitcher v. Sh. of Monmouth*, 2 Marsh. 152, unless the defendant consent that the jury process may be directed to the coroner; in these cases the court will not allow the venue to be changed, except upon special grounds. Nor will the court, without special grounds for the application, allow the venue to be changed, in any case where this affidavit cannot be made. Therefore where an action is brought for a libel, published in a newspaper which circulates in two or more counties, the venue cannot be changed except upon special grounds, as it cannot be sworn that the cause of action, namely, the writing and publication of the libel, arose in any one county and not elsewhere; *Pinkney v. Collins*, 1 T. R. 571; and the same, if the libel be contained in a letter, written in one county, and delivered in another. *Clissold v. Clissold*, 1 T. R. 647. *Hitchen v. Best*, 1 Brod. & B. 299. But if it be written and published in one county only, *Freeman v. Norris*, 3 T. R. 306, or written in England and published only abroad, *Metcalf v. Markham*, 3 T. R. 652, the venue may be changed on the common affidavit.

*The rule, &c.*] By R. G. H. 2 W. 4, s. 103, "in cases where the application for a rule to change the venue, is made upon the usual affidavit only, the rule shall be absolute in the first instance." This is moved for in the usual way in term time; in vacation, you may obtain a judge's order or fiat for the rule, and upon producing this, together with a motion paper signed by counsel, at the master's office, the rule will be drawn up. It is drawn up, upon reading the declaration. R. T. 49 G. 3, K. B. There is no objection to this rule being served at the same time that the plea is delivered, or imme-

diately after it. *Phillips v. Chapman*, 5 Dowl. 250. The application for it, however, must be before plea; see *Talmash v. Penner*, 3 B. & P. 12. *Herbert v. Flower v. Barnes*, 492. *Moses v. Stevenson*, 1 Taunt. 58. *Smith v. Walker*, 2 Moore, 64; it cannot be made even after a plea in abatement. *Wigley v. Dubbins*, 4 Bing. 18. Also, it cannot be made, after the defendant has had time to plead, on the usual terms; *Petyt v. Berkely*, Cowp. 510. *Shipley v. Cooper*, 7 T. R. 698. *Nun v. Taylor*, 1 Bing. 186. *Tonks v. Fisher*, 2 Dowl. 22. *Hathorn v. Bush*, *Id.* 240; but it may, if the terms be merely to plead issuably, *Russell v. Hurst*, 1 Cr. & M. 184. Per Lord Mansfield, Cowp. 511, or if merely a consent be indorsed on a summons for time, on the terms of taking short notice of trial, but no order be drawn up upon it. *Wilson v. Harris*, 2 B. & P. 320.

*Where rule discharged.*] As the rule is absolute in the first instance, it sometimes occurs that it is obtained in cases where it ought not; and in those cases the court, upon application, will in general discharge the rule. Thus for instance, where the venue was changed, upon the usual affidavit, in an action upon a bill of exchange, the court upon application discharged the rule; *Dawson v. Bowman*, 1 Cr. M. & R. 594; and the same, where the rule had been obtained in an action for a libel, published in a newspaper which was circulated in several counties, *Clements v. Newcome*, 1 Cr. M. & R. 776. *Hobart v. Wilkins*, 1 Dowl. 461, and in other cases where part of the cause of action took place in another county, *Cailland v. Champion*, 7 T. R. 205. but see *Price v. Woodburne*, 7 East, 433. *Wood v. Perkes*, 2 B. & A. 618, or in Ireland, *Hope v. Bennet*, 2 New Rep. 397, or Scotland. *Cailland v. Champion*, *supra*. See *Clarke v. Reed*, 1 New Rep. 310. *Guard v. Hodge*, 10 East, 32. So, where the rule had been obtained, after an order for time upon the terms of taking short notice of trial, the court upon application discharged the rule. *Petyt v. Berkely*, Cowp. 510. So, where it appeared by affidavit, that the defendant's attorney had said he would change the venue, for the purpose of postponing the trial, and that a statute would come into operation in the mean time, which would defeat the plaintiff's claim: the court discharged the rule for changing the venue. *Amner v. Cattell*, 5 Bing. 208. And it will be no answer to an application to discharge the rule, to state facts that probably would induce the court to change the venue on a special application. *Dawson v. Bowman*, 1 Cr. M. & R. 594.

*Venue, when and how brought back.*] Where the venue has been changed upon the usual affidavit, it "shall not be brought back, except upon an undertaking of the plaintiff to give material evidence in the county in which the venue was

originally laid." *R. G. H.* 2 *W.* 4, s. 103. See *Hill v. Payne*, 3 *Dowl.* 695. *Wood v. Perks*, 2 *B. & A.* 618. The rule in this case is obtained in the same way as the rule to change the venue, upon the affidavit of some person acquainted with the nature and circumstances of the action: *Williams v. Higgs*, 6 *Mees. & W.* 133: in form it is a rule to discharge that rule, but containing an undertaking, "at the trial of this cause, to give material evidence of some matter in issue, arising in the county of ———, where the cause of action was first laid." It may be obtained at any time. *Bruckshaw v. Hopkins*, *Cowp.* 409. If the plaintiff fail to give such evidence, he must be nonsuit, *Souther v. Heard*, 2 *W. Bl.* 1031, if the objection be made at the trial. *How v. Pickard*, 2 *Mees. & W.* 373.

As to what shall be deemed sufficient evidence to satisfy this undertaking: in an action for goods sold and delivered, proof of the delivery of the goods to a carrier within the county, to be conveyed to the defendant, would be sufficient; *Powell v. Rich*, 7 *Taunt.* 178; even proof that an invoice of the goods was put into the post office, for the defendant, at the time the goods were forwarded, was deemed sufficient. *Linley v. Bates*, 2 *Crompt. & J.* 659. In an action by the assignees of a bankrupt, the production of the commission, tested at Westminster, was deemed sufficient to satisfy an undertaking to give material evidence in Middlesex. *Kensington v. Chantler*, 2 *M. & S.* 37. In an action upon a warranty of a horse, proof of payment of the keep of the horse within the county, *Greenway v. Titchmarsh*, 7 *Mees. & W.* 221, 10 *Law J.*, 86, *ex.*, or proof of a letter written within the county by the plaintiff's attorney, apprising the defendant of the breach of warranty, and an admission within the county by the defendant's agent, of the receipt of that letter, *Collins v. Jenkins*, 3 *Bing. N. C.* 225, have been deemed sufficient. So the production of the rule to pay money into court, has been deemed sufficient to satisfy the like undertaking, although the rule were not obtained until after the undertaking had been given. *Watkins v. Towers*, 2 *T. R.* 275. And it is immaterial whether the evidence thus adduced go to the whole cause of action, or to a part only. *Savory v. Spooner*, 2 *Marsh*, 278, 6 *Taunt.* 564. And if the evidence be material, with reference to proof of the declaration or part of it, at the time the undertaking is given, but from the course the pleadings or proceedings take afterwards, such evidence becomes irrelevant and unnecessary: the undertaking in that case is dispensed with. *Soulsby v. Lea*, 3 *Taunt.* 86. Where the application was, not to bring back the venue, but to change it to a third county, and the defendant consented to it, it was holden that a judge at chambers had a power to make an order to that effect. *Leach v. Swallow*, 8 *Dowl.* 199. 9 *Law J.*, 138, *ex.*

2. *In transitory actions, upon special grounds.*

*In what cases.*] Where the venue cannot be changed upon the usual affidavit, either by reason of the cause of action not being such as would warrant such a proceeding, or that the defendant has neglected to make the application in time, the court will only allow it to be changed on special grounds, shewing the necessity for it.

If it appear manifest from circumstances stated upon affidavit, that the defendant cannot have a fair and impartial trial in the county in which the venue is laid, the court will change it to some other county. For instance, where in an action for slander, &c., it appeared that from the situation of the parties, and the high state of political excitement at Carnarvon (where the venue was laid) the defendant could not have a fair and impartial trial in that county, the court ordered the venue to be changed to Anglesea. *Lewis v. Morris*, 2 Dowl. 60. See also *Doe d. Mayor of Bristol v. —*, 1 Wils. 77. *Mayor of Bristol v. Proctor*, Id. 298. *Myloch v. Saladine*, 3 Burr. 1564. but see *Seeley v. Ellison*, 8 Dowl. 266. A strong case, however, must be made out to induce the court to interfere. And therefore where, in an action by the commissioners of the Bedford Level against certain persons for not executing a contract relating to the works of the Level, it was holden to be no ground for changing the venue from Cambridge, that most of the landholders in that county were rated to the Level. *Thornton v. Jennings*, 5 Bing. N. C. 485, 8 Law, J. 246, *cp.*

If it appear that a serious defence is intended, that the witnesses of both parties reside, not in the county in which the venue is laid, but at a great distance from it, and that the trial where the venue is laid will be attended with great additional expense, the court in general allow the venue to be changed to the county in which the witnesses reside, making the defendant submit to such terms as to admissions, &c. as may save the plaintiff from additional expense from the change. *Foster v. Taylor*, 1 T. R. 781. *Johnson v. Nevison*, 2 Dowl. 260. *Evans v. Weaver*, 1 B. & P. 20. *Holmes v. Wainwright*, 3 East, 329. *Robson v. Blackwell*, 2 Dowl. 645. See *Palmer v. Marshall*, 8 Bing. 155. *Pugh v. Kerr*, 6 Mees. & W. 17, 9 Law J. 255, *ex.* But the difference of the expense in trying it at the two places, must be great indeed, to induce the court to interfere; *Alcock v. Cook*, 6 Bing. 733; and it will be necessary also to satisfy them that the defendant has a fair and reasonable defence, that he has many witnesses, that they live at a great distance from the place where the venue is now laid, and that the plaintiff would have an impartial trial in the county to which the venue is sought to be changed.

*Watt v. Daniel*, 1 B. & P. 425. For this purpose, the court require that the affidavit on the part of the defendant should state what the defence is, that he intends to call witnesses to prove it, how many witnesses he has for that purpose, and where they reside. *Evans v. Weaver*, 1 B. & P. 20. *Ladbury v. Richards*, 7 Moore, 82. *Crompton v. Stewart*, 2 Cramp. & J. 473. *Higgins v. Houseman*, 1 Har. & W. 218, 3 Dowl. 549. *Parmeter v. Otway*, 3 Dowl. 66, and see *Johnson v. Berriaford*, 2 Cr. & M. 222. *Thornhill v. Oastler*, 8 Law J. 167, *cp.* If the plaintiff however have many witnesses, residing in the county where the venue is laid, and who are necessary to prove the issues joined, the court will not in that case interfere, *Flecke v. Godfrey*, 1 T. R. 782, *cit.* unless they can do so on terms of fairness to both parties. See *Bourring v. Bignold*, 1 Dowl. 685. Where the venue was laid in Yorkshire, and the witnesses for the defendant were Greenland fishermen, who would be absent at the time of the York assizes, the court upon application changed the venue from York to London. *Atkinson v. Sadler*, 2 Chit. 419.

If it appear necessary to have a view, the court, upon application of the defendant, will in general order the venue to be changed to the county in which the premises are situate, at the same time imposing upon him such terms as may be necessary and reasonable. *Hodinott v. Cox*, 8 East, 268. *Phybus v. Scudamore*, 8 Law J. 159, *cp.*

Where an action, in which the defendant was holden to bail, stood for trial at the Taunton assizes, but was not tried from a defect of jurors, and then the defendant's bail rendered him to the Fleet: on these grounds the court ordered the venue to be changed from Somersetshire to Middlesex, in order that the defendant, if he had a defence, might not be detained in prison until the following assizes. *Keys v. Smith*, 2 Dowl. 210. But it has been holden to be no ground for changing the venue, that there are but 29 special jurors in the county in which the venue is laid. *Doe v. Williams*, 5 Bing. N. C. 205.

An attorney, and perhaps a barrister, see *Newton v. Harland*, 6 Dowl. 630, 4 Bing. N. C. 406, when plaintiff in a transitory action, has a right to lay his venue in Middlesex; and if the defendant obtain a rule to change it upon the usual affidavit, the court will discharge that rule with costs. *Partington v. Woodcock*, 2 Dowl. 550. But if an attorney sue as an ordinary person, by attorney, he thereby waives this privilege as to venue, and the defendant may move to change it, as in ordinary cases. *Lowless v. Timms*, 3 Dowl. 707. Or if the action were commenced before the plaintiff was an attorney, he has no right to have the venue changed to Middlesex on account of his privilege. *Newton v. Harland*, *supra*. And as defendant, an attorney has no privilege as to venue, and cannot claim

to have it changed to Middlesex, if laid elsewhere, *Yeardley v. Roe*, 3 T. R. 573, except upon the usual affidavit, as any other person.

In a transitory action, the court will very seldom, at the instance of the plaintiff, amend the declaration, by altering the venue; for it is his fault that the venue was not rightly laid in the first instance. Where in an action by an attorney, the venue by mistake was laid in the country, the court refused to allow the plaintiff to amend, by altering it to Middlesex. *Lewis v. Shelly*, 7 Taunt. 146. Where the plaintiff applied to change the venue from Bedfordshire to Middlesex, on the ground that the action depended upon the construction of an Act of Parliament, the court refused it. *Ayres v. Buston*, 6 Taunt. 408. and see *Pearce v. Porkington*, 2 New Rep. 58.

*Into what county.*] In changing the venue upon special grounds, the court will name that county in which they think the cause can be best tried, and at the least expense; they will not change it into a county, where there is reason to suppose that an impartial and satisfactory trial cannot be had. See *Petyt v. Berkeley*, Coup. 510. There is no objection to its being changed to a county of a city or town corporate, after which the plaintiff may have a *venire* to the sheriff of the adjoining county, under stat. 38 G. 3, c. 52. *Bird v. Morse*, 7 Taunt. 385.

*When.*] The application in this case cannot be made until after issue joined; for until then it is impossible to say what the defendant will have to prove, or whether there are or will be any grounds for the application. *Weatherby v. Goring*, 3 B. & C. 552. *Cotterill v. Dixon*, 1 Cr. & M. 661. *Maude v. Sessions*, 1 Cr. M. & R. 86. *Youde v. Youde*, 1 Har. & W. 338, 4 Dowl. 32. *Parmeter v. Otway*, 3 Dowl. 66. And see *Jones v. Gee*, 1 Har. & W. 133. *Pearce v. Porkington*, 2 New Rep. 58. But see *Dowler v. Callis*, 4 Mees. & W. 531.

### 3. In local actions.

In local actions, in which the venue must of course be laid in the county where the cause of action arose, the courts, upon an application shewing that a fair and impartial trial cannot be had in such county, have been in the habit of ordering the issue to be tried in another county. And now, by stat. 3 & 4 W. 4, c. 42, s. 22, reciting that "unnecessary delay and expense are sometimes occasioned by the trial of local actions in the county where the cause of action has arisen," it is enacted that "in any action depending in any of the said superior courts, the venue in which is by law local,

the court in which such action shall be depending, or any judge of any of the said courts, may, on the application of either party, order the issue to be tried, or writ of enquiry to be executed, in any other county or place than that in which the venue is laid; and for that purpose any such court or judge may order a suggestion to be entered on the record, that the trial may be more conveniently had, or writ of enquiry executed, in the county or place where the same is ordered to take place." See *Briscoe v. Roberts*, 3 Dowl. 434. *Doe v. Harmer*, 1 Har. & W. 80. This application cannot be made until after issue joined. *Bell v. Harrison*, 2 Cr. M. & R. 733.

## SECTION III.

*Consolidating actions.*

*In insurance causes.*] Where several actions are brought against different underwriters on the same policy, a judge at chambers, upon the application of the defendants, will stay the proceedings, in all the actions but one, they undertaking to abide by the verdict in that one. Formerly issues must have been joined in all the actions, before the application to consolidate them could be made; afterwards it became a practice at judge's chambers to consolidate, after declaration and before plea; and recently it has been decided that it may be done after service of the writs and before declaration. *Hollingworth v. Brodrick*, and *Hollingworth v. Collinson*, 6 Nev. & M. 240, 1 Har. & M. 691. And the present practice upon the subject, will perhaps be best explained, by inserting here a copy of the rule drawn up in the case last mentioned, namely, "That all proceedings in the last mentioned cause, be stayed until the trial of the first mentioned cause, the defendant in the last mentioned cause hereby undertaking to be bound and concluded by the verdict in the first action, if such verdict shall be to the satisfaction of the judge who may try the same;—that if the defendant pay the premium into court in that action, the other defendant shall, within one week after such payment, pay the premium into court in the other action under this rule; and that the plaintiff be at liberty to take the same out of court; and if he elect to accept such premiums in satisfaction of such action, that he be at liberty to tax his costs, at any time either before or after the verdict in the first action;—that if the verdict be found for the plaintiff in the first mentioned action, to the satisfaction of the judge before whom, &c., then the defendant in the other action shall pay to the plaintiff the amount of the sum assured by him, or such proportion thereof as the verdict recovered bears to the sum assured by the defendant in that action,



together with the costs up to that time to be taxed by the master, within a fortnight after the taxation of the plaintiff's costs in the action tried; that if the money be not so paid, the plaintiff shall be at liberty to file a declaration, and sign judgment by default, for the amount in the action in which the money is neglected to be paid, unless a judge shall otherwise order;—and that if the defendant in the first cause to be tried, pay the premium into court, and the verdict is found for the defendant, the plaintiff nevertheless shall be at liberty to tax his costs, sign judgment, and issue execution in the other action for such costs, unless the defendant pay the same within a fortnight after the verdict in the action which shall be so tried as aforesaid." 6 Nev. & M. 243 n. See *Ohrly v. Dunbar*, 1 Nev. & P. 244. Where money is paid into court in several actions which are thus consolidated, and the plaintiff, without taxing costs, proceeds to trial on one, and fails, he shall nevertheless be entitled to costs on the others, up to the time of paying money into court. *R. G. H. 2 W. 4, s. 104.* Where the defendants in several actions on a policy of insurance paid money into court, at the rate of 46 per cent. on their respective subscriptions, and then took out a summons to consolidate, to which the plaintiff refused to consent; an order was thereupon made that the proceedings in all the actions but one should be stayed until the fifth day of the term next after the trial of that one, the defendants admitting their subscription to the policy, the plaintiff's interest, &c.: at the trial of the first action, a case was reserved for the opinion of the court, and the court being of opinion that the defendant was liable only to the extent of the money paid into court, gave judgment for him; but the court held that in the other actions, the plaintiff was entitled to his costs up to the time of payment of money into court. *Powell v. Parkinson*, 6 M. & S. 107. See *Redman v. Woodman*, 5 Taunt. 607. *Burstall v. Horner*, 7 T. R. 372. And the plaintiff cannot be bound not to proceed in the other actions, without his consent. *McGregor v. Horsfall*, 6 Dowl. 338, 3 Mees. & W. 320. And see *Ward v. Pomfret*, 1 Man. & Gr. 559. The defendants, however, are bound by the first verdict, if the judge who tried the cause be satisfied with it. And where after the trial of the first cause for the plaintiff, the court granted a new trial, and the second verdict was the same way, the court refused a third trial, *Foster v. Steele*, 3 Bing. N. C. 892, and also refused to allow one of the other defendants to have his cause tried, which involved merely the same point as the first action. *Foster v. Alvez*, *Id.* 896.

*In other cases.]* If two separate actions be brought for causes of action which might have been joined in the same action, and the plaintiff can assign no satisfactory cause for

commencing two actions instead of one: the court will deem the proceeding oppressive, order the actions to be consolidated, and make the plaintiff pay the costs. *Cecil v. Brigge*, 2 T. R. 639. In ejectment, where thirty-seven actions were brought against different tenants of parts of the same estate, all depending upon the same title: the court ordered them to be consolidated, Lord Kenyon saying it was a scandalous proceeding. 2 *Sellon Pr.* 144. But in a prior case, the contrary was holden. *Smith v. Crabb*, 2 Str. 1149. Perhaps both cases are reconcilable with the rule established by the case of *Cecil v. Brigge* above-mentioned: in the one, probably there was no satisfactory reason for bringing several actions; in the other possibly there was. But where a person brought three ejectments in the court of King's Bench, and that court stayed the proceedings in two, and confined the lessor of the plaintiff to one, upon certain terms, which rendered it probable that he would ultimately have to pay the costs; and the party, instead of proceeding with the action in the King's Bench, brought an ejectment for the same property in the Common Pleas, the latter court, upon application, stayed the proceedings in it. *Doe v. Brenton*, 6 Bing. 469. But the court have refused to consolidate several actions against the same party, on different bills of exchange due at different times, where the party could not have included them in one action, without delaying to proceed until the whole had become due. *Mussenden, v. O'Hara*, 1 Tidd, 664. And there is no instance of a consolidation of actions brought by different plaintiffs against the same defendant. *Nichols v. Lefevre*, 3 Dowl. 135. Also in penal actions, the court will seldom grant a consolidation rule. See *Benton v. Praed*, 1 Smith, 423. So, the court have holden that an action against husband and wife, and an action against the husband alone, could not be consolidated. *Swithen v. Vincent*, 2 Wils. 227.

Where the proceedings in one of two actions are stayed, upon the defendant undertaking to be bound by the verdict in the other, this means the ultimate event of the cause; *Hodson v. Richardson*, 3 Burr. 1477; and if error be brought in the action tried, the court will stay the proceedings in the other action, upon the defendant giving security to abide by the decision of the court of error. *Gill v. Hinkley*, 1 Moore, 79; and see *Aylwin v. Favine*, 2 New Rep. 430. If the decision be against the plaintiff, the court will seldom allow him to try any of the other actions, even although he may since have found fresh evidence. *Pullen v. Parry*, 1 Chit. 709, (a). and see *Cohen v. Bulkeley*, 5 Taunt. 165.

## SECTION IV.

*Inspection of books, deeds, &c.*

*Corporation books, &c.*] The general principle upon this subject is, that wherever a person holds a book or document, as trustee for another, he is bound to allow that other person inspection of it; and if he refuse to do so, the court will compel him. If a corporation bring an action for toll, the defendant may have a rule upon the town-clerk to give him inspection of all charters, records, deeds, &c. in his custody, relating to such tolls, *Barnstable v. Lathby*, 3 T. R. 303. *Lynn v. Denton*, 1 T. R. 689, if such defendant be a member of the corporation, but not otherwise. *Mayor of Southampton v. Graves*, 8 T. R. 590. So in a dispute between corporators, an inspection of the corporation documents relating to the matter in dispute will be granted to either of them, for they have a right to see them. *Per Ld. Kenyon, C. J.* 8 T. R. 592. And in an action by a corporation on a bye law, the court will grant the defendant inspection of the bye law in the books of the corporation, whether he be a member of the corporation or not. *Harrison v. Williams*, 3 B. & C. 162. On the other hand, the mere accidental circumstance of a party being a member of a corporation, will not give him a right to inspect the corporation books, &c. respecting matters of private concern, having no reference to his rights as a burgess; and therefore where an attorney, having brought an action against a corporation for the amount of his bill for business done, applied for an inspection of the corporation books, to enable him to prove his retainer, *Littledale, J.* refused it, saying that if the plaintiff wished the books at the trial, he might give the defendants notice to produce them. *Stevens v. Mayor of Berwick*, 4 Dowl. 277. As to the inspection by free-men of the books, &c. in which their freedom is entered, see *stat.* 3 G. 3, c. 15, 32 G. 3, c. 58. *Schuldham v. Bunnis, Corp.* 192. *Dawis v. Humphreys*, 3 M. & S. 223. In informations in the nature of a *quo warranto*, the court, after the rule for the information has been made absolute, will grant inspection of the corporation books, *Per Ashurst, J.* 3 T. R. 581, but only of such as relate to the matter in dispute, even although the relator be a member of the corporation. *R. v. Babb*, 3 T. R. 579. But in criminal cases, such as an indictment or information against a member of a corporation, the court will not compel the corporation to grant inspection of their books to the prosecutor. *R. v. Purnell*, 1 W. Bl. 37, 1 Wils. 239. *R. v. Haydon*, 1 W. Bl. 351.

*Court rolls, &c.*] A copyhold tenant of a manor, has a right to an unqualified inspection of the court rolls and books of

the manor; *Ex p. Hutt*, 7 Dowl. 690. His right is not confined to what relates to his own title. *R. v. Shelley*, 3 T. R. 141. And he is entitled to such inspection, although no action be pending. *R. v. Lucas*, 10 East, 235. *R. v. Tower*, 4 M. & S. 162. A freehold tenant of a manor, however, has no such right to inspect the court rolls, unless an action be pending. *R. v. Allgood*, 7 T. R. 746. But in an action by a stranger against the lord, the stranger has no right to such inspection. *Talbot v. Villebois*, 3 T. R. 142, n. By R. G. H. 2 W. 4, s. 102, "an order upon the lord of a manor, to allow the usual limited inspection of the court rolls, on the application of a copyhold tenant, may be absolute in the first instance, upon an affidavit that the copyhold tenant has applied for and been refused inspection." This rule, however, it seems, relates only to cases where an action is pending; in other cases the application is for a rule *nisi* only. *Ex p. Best*, 3 Dowl. 38.

*Public books and documents.*] Every person is entitled to an inspection of the records of the courts of law. So of a writ, if returned, any persons may have inspection, as of right, for it is then matter of record. Even where a *habeas* is lodged with the marshal, the court upon application will order an inspection of it and of the *committitur* indorsed upon it to be given to the plaintiff's attorney, although the object of the application be to enable the plaintiff to bring an action against the marshal for an escape; *Fox v. Jones*, 7 B. & C. 732; for the *habeas*, when delivered to the marshal, remains with him *quasi* of record, and is never filed with the *custos brevium*. But if a writ remain in the hands of a sheriff, the court will not order inspection of it, to enable a plaintiff to bring an action against the sheriff; *R. v. Sh. of Chester*, 1 Chit. 476; if inspection be required, it may be had by ruling the sheriff to return the writ. In like manner every person has a right to inspect the books of the sessions of the peace. *Herbert v. Ashburner*, 1 Wils. 297. Every parishioner has a right to inspect the parish books, *Anon.* 2 Chit. 296, if he require it for parochial purposes, but not otherwise; *May v. Gwynne*, 4 B. & A. 301. *R. v. Smallpiece*, 2 Chit. 288; but where it was required, in order to sustain an information against overseers for making an illegal rate, the court refused it. *R. v. Lee*, 1 Wils. 240. So, a member of either of the Universities may have inspection of its statutes and archives, if it become requisite in any matter affecting him in his relation of member; but where an information was filed by the attorney-general against the vice-chancellor of Oxford, for a misdemeanor in his office, the court held that the crown had no right to such inspection. *R. v. Purnell*, 1 Wils. 239, 1 W. Bl. 37. In like manner a prebendary may have inspection of the charters, &c. of the chapter, in any matter relating to his prebend; *Young*

*v. Lynch*, 1 *W. Bl.* 27; or a member of the College of Physicians, inspection of the books of the college; but the court will not order such inspection to be given to a stranger. *West v. Coll. of Physicians*, 1 *Wils.* 240. In an action by a public company against one of its members, the court refused the defendant an inspection of the books of the company, which he wanted for the purpose of making out a defence to the action. *Birmingham Railway Co. v. White*, 10 *Law, J.* 121, *qb.* Nor will the court, in collateral proceedings, grant inspection of the books of the Post Office, *Crew v. Blackburne*, 1 *Wils.* 249, 2 *Str.* 1005, or Custom-house, *Benson v. Port*, 1 *Wils.* 240, as it might probably be prejudicial to the revenue. *See Atherfold v. Beard*, 2 *T. R.* 616. And where an information was filed against an officer of the East India Company, on charges of delinquency in India, forwarded upon the report of a board of inquiry there, the court refused to grant the defendant an inspection of that report, saying that they had no discretionary power to grant it. *R. v. Holland*, 4 *T. R.* 691. Also where a public document was set out in an inquisition post mortem, which was filed at the Rolls Chapel, and might be inspected by any person, the court refused to make a defendant, who had the original document in his possession, give the plaintiff an inspection of it. *Wood v. Morewood*, 9 *Dowl.* 669.

*Private documents.*] Where private account books of the plaintiff came into the hands of the defendant as his agent, the court ordered that the plaintiff should have inspection of them, for the defendant held them as trustee for the plaintiff. *Jones v. Palmer*, 4 *Dowl.* 446. So, in an action against a sworn broker of the city of London, for negligence in making a contract, the court, on application, compelled him to produce his books, in order that the plaintiff might inspect and take a copy of the contract. *Browning v. Aylwin*, 7 *B. & C.* 204. But the court cannot order that a defendant shall have inspection of the plaintiff's books; but they may, if they deem it necessary for the ends of justice, enlarge the time for pleading, to enable the defendant to get an answer to a bill of discovery. *Whitter v. Crozalet*, 2 *T. R.* 683.

Where two or more persons are parties to a deed or other written instrument, and only one part has been executed, whoever has the custody of that part, holds it as trustee for the other parties, and the court will oblige him to give them inspection of it. *Blakey v. Porter*, 1 *Taunt.* 386. *King v. King*, 4 *Taunt.* 666. *Gigner v. Bayley*, 5 *Moore*, 71. *Doe d. Morris v. Roe*, 1 *Mees. & W.* 207. *Reid v. Coleman*, 2 *Cr. & M.* 456. *R. v. Mayor of Beverley*, 8 *Dowl.* 140. And the same, if a deed, &c. executed by one person only, be in the possession of another. *Morrow v. Saunders*, 1 *Brod. & B.* 318. But if there have been several parts of the deed, &c. executed, and each

party had one, one whose part has been destroyed or lost, is not entitled to an inspection or copy from any of the others, although his part was lost or destroyed without any fault upon his part. *Street v. Brown*, 6 Taunt. 302. See *Mayor of Arundel v. Holmes*, 8 Dowl. 118. Nor will the court grant inspection to a person who was not a party to the deed, &c. *Brown v. Rose*, 6 Taunt. 283. *Ratchiffe v. Pleasby*, 3 Bing. 148. *Smith v. Winter*, 3 Mees. & W. 309, unless he claim by or through some person who was a party. See *Bateman v. Phillips*, 4 Taunt. 161. But the court refused to compel a party to allow inspection of his title deeds, to a person who supposed that such deeds contained a reservation of manorial rights in his favour, where it did not appear that the party held the deeds as trustee for the applicant. *Pickering v. Noyes*, 1 B. & C. 262. Where under a warrant for felony against a plaintiff, the deed on which the action was brought was taken from him, the court ordered that a copy of it should be furnished to him to declare upon. *Harris v. Aldrit*, 2 Chit. 229. So the court will order inspection to a person, for the purpose of his ascertaining who are the subscribing witnesses, in order to subpoena them, if his affidavit show that he has neither copy nor counterpart of the instrument, and that the production and proof of it at the trial will be necessary for him. *Anon.* 2 Chit. 230. But the court will not order a plaintiff to allow an officer of stamps to inspect the instrument on which he has declared, to see whether it is on a forged stamp; *Chetwind v. Marnell*, 1 B. & P. 271; or order the plaintiff to deposit bills of exchange, on which the action is brought, in the hands of the officer of the court, that they may be inspected, in order to ascertain whether they are forgeries. *Hildyard v. Smith*, 1 Bing. 451. and see *Threlfall v. Webster*, Id. 161. *Woolner v. Devereux*, 9 Dowl. 672, 10 Law J. 207, cp. And they have refused inspection of an agreement, where the object was to enable the defendant to plead in abatement the nonjoinder of others. *Beale v. Bird*, D. & R. 119. In order to make this application for inspection of a deed, &c. it seems necessary that an action shall at the time be pending, for which it may be required; *Ex p. Partridge*, 1 Har. & W. 350; and the affidavit must negative the party's having any copy or counterpart of the instrument. *Morrow v. Saunders*, 1 Brod. & B. 318. The court also have refused to order inspection to be given of a deed, which was wanted merely for the purpose of moving for a new trial. *Wood v. Morewood*, 9 Dowl. 44, 10 Law J. 53, cp.

Also, if a defendant have in his possession a written instrument requiring a stamp, in which the plaintiff is interested, and which may be necessary as evidence for him at the trial, the court will make the defendant produce it, in order that the plaintiff may have it stamped; *Bateman v. Phillips*, 4 Taunt. 157; and this is now so much a matter of ordinary practice,

that a judge at chambers will make an order to that effect, upon summons. But the court or judge will not interfere, unless the applicant be interested in the instrument to be stamped. *Taylor v. Osborne*, 4 Taunt. 159, n.

Also, when a party to an action filed an affidavit stating the substance of a written document, but not annexing it, or a copy of it, Coleridge, J. ruled that the other party had a right to a copy of it. *Tebbutt v. Ambler*, 7 Dowl. 674.

*Other matters.*] In an action for goods sold and delivered, or work done, the court have no power to allow an inspection of the goods or work, to enable the plaintiff to give evidence of identity, &c., *Dell v. Taylor*, 6 D. & R. 388, or value, *Turquand v. Guardians of the Strand Union*, 8 Dowl. 201, 9 Law J. 150, ex. In an action for infringing a patent for making lace, the court refused to compel the plaintiff to produce a specimen of the patent lace, to enable the defendant to prepare his defence to the action. *Crofts v. Peach*, 1 Hodg. 110. In an action by a shipowner against the owners of goods on board, for general average, the court refused the defendants an inspection of the protest or the other usual documents. *Twizell v. Allen, et al.*, 5 Mees. & W. 337.

#### SECTION V.

##### Rule to discontinue.

The plaintiff may discontinue his action before verdict, if he wish it, by obtaining a rule from the clerk of the rules at the master's office for that purpose. The court have allowed it, after demurrer argued, but before judgment; 2 Saund. 74, n. 1; and even after a special verdict, (that not being complete and final,) but it was considered a matter of great favour. *Price v. Parker*, 1 Salk. 178. But it is never allowed after a general verdict, *Price v. Parker*, 1 Salk. 178. *Anon.* 1 Lev. 48. *Goodenough v. Beetles*, 2 Cr. M. & R. 240, or after a writ of inquiry executed and returned, *Stevens v. Etherick, Carth.* 86, or after a peremptory rule for judgment on demurrer. *Turner v. Turner*, 1 Salk. 179. Before plea pleaded, this rule may be had as a matter of course from the clerk of the rules at the master's office. After plea, it was formerly necessary to obtain the consent of the defendant's attorney, to discontinue; but now, by R. G. H. 2 W. 4, s. 106, "to entitle a plaintiff to discontinue after plea pleaded, it shall not be necessary to obtain the defendant's consent; but the rule shall contain an undertaking on the part of the plaintiff to pay the costs, and a consent that if they are not paid within four days after taxation, defendant shall be at liberty to sign a *non pros.*" But

where the plaintiff gave this undertaking and obtained the rule, but did not pay the costs; and the defendant, instead of signing judgment of *non pros*, applied for and obtained a rule nisi for judgment as in case of a nonsuit: the court, upon this appearing, discharged the rule with costs. *Cooper v. Holloway*, 1 *Hodg.* 76. In all other cases the action is not deemed to be discontinued, until the costs are paid, *Molling v. Buckholtz*, 3 *M. & S.* 153. *Whitmore v. Williams*, 6 *T. R.* 765, unless the defendant be in custody; *White v. Gompertz*, 5 *B. & A.* 905; and where the plaintiff, instead of paying costs, proceeded in the action, and obtained a verdict, the court refused to set aside the verdict, and order a discontinuance to be entered. *Edgington v. Proudman*, 1 *Dowl.* 152. Formerly, however, where the costs were taxed and paid, the discontinuance had relation back to the time when the rule was obtained; *Brandt v. Peacock*, 1 *B. & C.* 649; but how far that would be holden now, may be doubted. As to the costs, see *Rivis v. Hatton*, 8 *Dowl.* 164, *S. C. nom. Rivis v. Watson*, 9 *Law J.* 100, *ex.*

But where a defendant pleads *puis darrein continuance*, the plaintiff may have a rule or order to discontinue without payment of costs. *Wollen v. Smith*, 9 *Ad. & El.* 505, 8 *Law J.* 122, *qb.* In some cases, also, under peculiar circumstances, the court will allow a plaintiff to discontinue without payment of costs. See *Ames v. Ragg*, 2 *Dowl.* 35. And where a plaintiff obtained a verdict, which was set aside and a new trial granted; and the plaintiff, instead of proceeding to the new trial, discontinued the action, the court held that he was not liable to the costs of the former trial. *Gray v. Cox*, 8 *D. & R.* 220. See *Patterson v. Powell*, 2 *Dowl.* 738. A rule to discontinue without costs, is often drawn up by consent.

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## CHAPTER IV.

### *Pleading and other proceedings, to issue.*

#### SECTION I.

##### *Security for costs.*

*In what cases.]* Ordering a plaintiff to give security for costs is a matter entirely in the discretion of the court. *M'Culloch v. Robinson*, 2 *New Rep.* 353. But the court will not order a defendant to find such security, except a defendant in replevin. *Selby v. Cruchley*, 1 *Brod. & Bing.* 505, but see *Heskett v. Biddle*, 1 *Hodg.* 119, 3 *Dowl.* 634. The following are the cases, in



which a plaintiff is usually required to give security for costs.

1. Where the plaintiff is permanently resident abroad, *Baker v. Hargraves*, 6 T. R. 597. *Pray v. Edie*, 1 T. R. 267. *Ganesford v. Levy*, 2 H. Bl. 118. *Demanraff v. Jackson*, 13 Price, 603. *Drury v. Johnson*, *Id.* 489, even although he be the king of a foreign state, *Don Pedro v. Robinson*, 6 Ad. & El. 801. *Otho v. Wright*, 6 Dowl. 12, or although he went abroad since the commencement of the action, *Gurney v. Key*, 3 Dowl. 559, the court upon application will stay the proceedings in the action, until he give security for costs. But where the plaintiff is abroad for a temporary purpose, the court will not make him give security for costs. *Ford v. Bouchers*, 1 Hodg. 58. *Taylor v. Frasey*, 2 Dowl. 622. *Frodsham v. Myers*, 4 Dowl. 280. 1 Har. & W. 526. *O'Lawler v. McDonald*, 8 Taunt. 736. *Cole v. Beale*, 7 Moore, 613. In *Wells v. Barton*, 2 Dowl. 160, Patteson, J. took this distinction: where the absence is temporary, if the plaintiff were abroad at the commencement of the action, he shall find security for costs; but if he went abroad after the commencement, he shall not. But this distinction is not recognized in the Common Pleas. *Ford v. Boucher*, 1 Hodg. 58. So if an Englishman be abroad by compulsion, as when he is a prisoner of war, *Tullock v. Crowley*, 1 Taunt. 18, or serving in some public office under government in the colonies. *Ld. Nugent v. Harcourt*, 2 Dowl. 578. *Evering v. Chiffenden*, 7 Dowl. 586, or serving in the army there, or the like, he shall not be obliged to find security for costs. So, if the plaintiff be a foreigner, serving abroad on board an English ship, the court will not require from him security for costs. *Heushen v. Garves*, 2 H. Bl. 383. *Jacobs v. Stevenson*, 1 B. & P. 96. *Maria v. Hall*, 2 B. & P. 236. So, a foreigner in this country, although his permanent residence be abroad, yet as long as he remains in this country, he shall not be compelled to find security for costs. *Porrier v. Caster*, 1 H. Bl. 106. *Anon.* 8 Taunt. 737. *Anon.* 3 Moore, 78. *Civagno v. Hassan*, 6 Taunt. 20. *Dowling v. Harman*, 6 Mees. & W. 131, but see *Oliva v. Johnson*, 5 B. & A. 908. *semb. cont.* Also where the plaintiff was a foreigner, but in the habit of residing four months in every year in this country, and was a man of property, the court of Common Pleas refused to oblige him to give security for costs; *Durell v. Matheson*, 8 Taunt. 711; and the same, where the plaintiff, a foreigner, was captain of a ship, and in the habit constantly of sailing to and from the ports in this country. *Nelson v. Ogle*, 2 Taunt. 253. So the court will not compel a foreign ambassador to give security for costs, although by a fiction of the law of nations, he is deemed to be a resident in the country which sent him. *Duc de Montellano v. Christin*, 5 M. & S. 503. So, a peer, though resident abroad, will not be compelled to

give security for costs. *Earl Ferrars v. Robbins*, 2 Dowl. 636. But in all cases where a plaintiff shall be obliged to give security for costs, on the ground of his residing abroad, a plaintiff residing in Ireland, *Fitzgerald v. Whitmore*, 1 T. R. 362. *Mahon v. Martinez*, 4 Moore, 356. *Maloney v. Smith*, 1 Mc Clel. & Y. 213. *Limerick Railway Co. v. Fraser*, 4 Bing. 394, or Scotland, *Mc Clean v. Austin*, 1 Tidd. 579, or any other place out of the jurisdiction of the court, will in like manner be ordered to find security. Also what has been above mentioned as to plaintiffs generally, may be considered as applying to plaintiffs in error. *Lewis v. Owens*, 5 B. & A. 265. And in cases where the court will thus order security to be given for costs, they will do so, although it may appear that the defendant has no real defence to the action, *Burd v. Botham*, E. 37 G. 3, MS. B. 2842. *Edinburgh Railway Co. v. Dawson*, 7 Dowl. 573, or although the plaintiff sue only as executor, *Chevalier v. Finnis*, 1 Brod. & B. 277. *Chamberlain v. Chamberlain*, 1 Dowl. 366, or sue in *forma pauperis*; *Foss v. Wagner*, 2 Dowl. 499; but see *Andrews v. Marris*, 7 Dowl. 712; or although the action be brought by the permission of the court of Chancery, *Oliva v. Johnson*, 5 B. & A. 908, although otherwise if it be brought by order of the court. *Id. Semb.* And it will be no answer in these cases to say, that the defendant also resides abroad. *Baxter v. Morgan*, 2 Marsh. 80, 6 Taunt. 379. If however the action be brought by two plaintiffs, and one of them alone reside abroad, as in that case there is one person in this country to answer for the costs, if costs should be awarded, the court will not oblige the other to find security. *Anon.* 7 Taunt. 307. *Mc Connel v. Johnson*, 1 East, 431. *Anon.* 1 Dowl. 300. *Anon.* 2 Crompt. & J. 88. *Orr v. Bowles*, 1 Hodg. 23. *Doe d. Bowden v. Roe*, *Id.* 315. but see *Limerick Railway v. Fraser*, 7 Bing. 394.

2. Where the plaintiff, after causing the defendant to be arrested, removed his furniture, and absconded to avoid a charge of bigamy, Gurney, B. ordered him to give security for costs. *Rogers v. Bangor*, 4 Dowl. 411, but see *Lloyd v. Davis*, 1 Tyr. 533.

3. The court will not make a plaintiff give security for costs, merely because he is poor, or even insolvent; *Field v. Carron*, 2 W. Bl. 27. *Morgan v. Evans*, 7 Moore, 344. *Ross v. Jacques*, 8 Mees. & W. 135. *Gregory v. Elvidge*, 2 Cr. & M. 336; but if a plaintiff, after commencing an action, take the benefit of the insolvent act, and the action be continued by his assignees for the benefit of his estate, *Heaford v. Mc Knight*, 2 B. & C. 579, or indeed whether assignees be appointed or not, *Doyle v. Anderson*, 2 Dowl. 596, but see *Snow v. Townsend*, 6 Taunt. 123, or if he become a bankrupt, and the action be continued by his assignees for the benefit of his estate, *Webb v. Ward*, 7 T. R. 296. *Mason v. Polhill*, 1 Cr. & M. 620, or be continued



ejectment for the same property; *Doe v. Alston*, 1 T. R. 491; the motion should be, to stay proceedings in the second ejectment, until the costs of the first were paid. *Id. per Buller, J.*

9. The cases we have been considering, are those in which the plaintiff is required to give security for costs at the instance of the defendant. But if a wife, living apart from her husband, bring an action in his name, or in the joint names of both, without his consent, the court at the instance of the husband will stay the proceedings, until indemnity is given to him against costs. *Harrison et ux. v. Almond*, 1 Har. & W. 119, 4 Dowl. 321. But the defendant in such a case cannot demand security for costs. *Mingotti v. Drummond*, 1 Ld. Ken. 469. And see *Chambers v. Donaldson*, 9 East, 470. And see *post*, p. 263.

*Application.*] Formerly it was required that a previous application should be made to the plaintiff or his attorney for security for costs, before the defendant applied to the court. *Bass v. Clive*, 3 M. & S. 283. And as this is a rule to stay proceedings, in the Common Pleas it is still necessary to make such previous application before you move. *Adams v. Brown*, 1 Dowl. 273. *Hunley v. Bulwer et al.*, 6 Dowl. 633. But in the court of Queen's Bench, *Baillie v. De Bernales*, 1 B. & A. 331, and Exchequer, *Jones v. Jones*, 2 Crompt. & J. 207, 1 Dowl. 313. *Fountain v. Steele*, 5 Dowl. 331, such previous application is necessary only to entitle you to have the rule *nisi* drawn up with a stay of proceedings.

By R. G. H. 2 W. 4, s. 98, "an application to compel the plaintiff to give security for costs, must in ordinary cases be made before issue joined." See *Fletcher v. Law*, 1 Har. & W. 430. *Gurney v. Key*, *Id.* 203, 3 Dowl. 559. *Wilson v. Minchin*, 1 Dowl. 299. *Bohrs v. Sessions*, 2 Dowl. 710. After verdict, and a new trial granted, Pattenon J. refused the application; *Oxenden v. Cropper*, 4 Dowl. 574. 1 Har. & W. 642; and the court of Exchequer, in another case, refused to order further security beyond that already given. *Alivon v. Furnival*, 2 Cr. & M. 555. And in all applications after issue joined, it must appear that they were made without delay after the defendant became acquainted with the facts which entitle him to move. *Wainwright v. Bland*, 2 Cr. M. & R. 740. Formerly, after a defendant had agreed to take short notice of trial, he could not apply for security for costs, that being deemed a waiver of his right to make the application; *Michel v. Pariski*, 2 H. Bl. 593. *Duke de Montellano v. Garcias*, 1 Bing. 67; but it is now holden otherwise, provided the application be made before issue joined, as above mentioned, *Dowling v. Harman*, 6 Mees. & W. 131. And if the defendant, before issue joined, was not aware of the plaintiff's residing abroad, or other ground of applying for security for costs, he

may then make the application, even after issue joined, provided he do so promptly, and before he takes any further step in the cause; *Wainwright v. Bland*, 2 Cr. M. & R. 740. *Harvey v. Jacob*, 1 B. & A. 159. See *Brown v. Wright*, 1 Dowl. 95. *Duncan v. Stint*, 5 B. & A. 702. *Wilson v. Minchin*, 2 Tyr. 166. *Jones v. Jones*, 2 Crompt. & J. 207. *Walters v. Frythall*, 5 East, 338. *Young v. Rinsworth*, 8 Ad. & El. 479, n; and before issue joined, the above rule gives the court a discretion to grant the application, although the defendant may have taken a step in the cause, after he had knowledge of the plaintiff's being abroad, &c. *Fletcher v. Lew*, 5 Nev. & M. 351. *Fry v. Wills*, 3 Dowl. 6. Where a plaintiff went to reside abroad after his cause was set down in the demurrer paper, the court, on an application for security for costs, ordered the demurrer to be argued, and that if judgment should be for the plaintiff, his further proceedings should be stayed until he should give the security required. *Kemble v. Mills*, 1 Man. & Gr. 565. On the other hand, the application cannot be made until after appearance. *De la Preuve v. Duc de Biron*, 4 T. R. 697. But if there be two defendants, and one appear, he may apply for security for costs, although an appearance have not been entered for the other. *Carr v. Shaw*, 6 T. R. 496. If the rule nisi be granted on the last day of term, it cannot be drawn up with a stay of proceedings. *Gronow v. Pointer*, 3 Dowl. 571.

Formerly it was deemed necessary in the affidavit, to state the stage of the proceedings; *Luzzaletti v. Powell*, 1 Marsh. 376; and it may be prudent still to do so. But the court of Exchequer have holden this to be unnecessary; for if the motion be too late, it will be for the other party to show it, if he object to the application on that ground. *Cole v. Beardy*, 5 Dowl. 161. *Jones v. Jones*, 2 Crompt. & J. 207. That court have also holden that an affidavit stating the deponent's belief as to the plaintiff residing abroad, is sufficient; *Dowling v. Harman*, 6 Mees. & W. 131, 9 Law J. 53, ex.; although the contrary was before holden by Patteson J. *Sandys v. Hohler*, 6 Dowl. 274.

The rule, if granted, is merely a rule to stay the plaintiff's proceedings, until security be given for costs: the court will not superadd to it, the term that if security be not given within a certain time, the defendant shall be at liberty to sign judgment as in case of nonsuit, *Kelly v. Brown*, 5 Dowl. 264, or the like, nor will they even order the security to be given within any fixed time. *Broughton v. Jeremy*, 1 Har. & W. 525. But where the defendant, applying, is in custody at the suit of the plaintiff in the action, the court will make it part of the rule, that, if security for costs be not given within a certain time, the defendant shall be discharged out of custody, on filing common bail. In discussing the matter of the rule, however, upon cause being shown, the court will not

enter into the merits of the case. *Ciragno v. Hassan*, 6 Taunt. 20. The security to be given, must be such as the master may approve of. And it must be for the costs already incurred, as well as for those which may afterwards accrue. *Harvey v. Jacob*, 1 B. & A. 159. But see *Oxenden v. Cropper*, 4 Dowl. 574, per *Patteson J. cont.*

If the security be given, and the sureties afterwards turn out to be insolvent, the court will not relieve the defendant, by again staying the proceedings until fresh security be given; *Jones v. Jacobs*, 2 Dowl. 442; nor will the court increase the amount of the security already given. *Alvon v. Furnival*, 2 Cr. & M. 555. *Kent v. Poole*, 7 Dowl. 572. On the other hand, the court will not cancel the security given, upon the plaintiff's return to England, although he swear that he intends permanently to reside here. *Badnall v. Haylay*, 4 Mees. & W. 535, 8 Law J. 46, *ex.*

*Time for pleading after it.]* If the time for pleading be out, at the time the plaintiff gives the security, still he cannot sign judgment as for want of a plea until the day next following. *Decker v. Thompson*, 3 B. & P. 319.

## SECTION II.

*Particulars of demand, &c.*

*With declaration.]* By R. G. T. 1 W. 4, s. 6, "with every declaration (if delivered), or with the notice of declaration (if filed), containing counts in *indebitatus assumpsit* or debt on simple contract, the plaintiff shall deliver full particulars of his demand under those counts, where such particulars can be comprised within three folios; and where the same cannot be comprised within three folios, he shall deliver such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios. And to secure the delivery of particulars in all such cases, it is further ordered, that if any declaration or notice shall be delivered without such particulars, or such statement as aforesaid, and a judge shall afterwards order a delivery of particulars, the plaintiff shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver."

The only effect of nondelivery of particulars with the declaration, as thus ordered, will be, the loss of costs, if full particulars of demand be afterwards ordered. And where in an action in the Exchequer, particulars were annexed to the declaration, but by mistake they were intituled in the King's Bench; and in three days after, the plaintiff perceiving his

mistake delivered particulars properly intituled, and afterwards signed judgment, because the defendant had not pleaded within the time limited for that purpose, calculated from the delivery of the declaration: the defendant contended that the time should be reckoned from the redelivery of the particulars; but the court held otherwise, for the plaintiff might have delivered his declaration without any particulars, and besides the particulars as re-delivered were merely a substitution for those originally annexed to the declaration. *Jones v. Fowler*, 1 Gale, 256.

*Annexed to the record.*] By R. G. T. 1 W. 4, s. 6, also, it is further ordered, "that a copy of the particulars of demand, and also particulars (if any) of the defendant's set-off, shall be annexed by the plaintiff's attorney to every record, at the time it is entered with the judge's marshal." The particulars of demand being thus annexed to the record, dispenses with proof of them at the trial. *Macarthy v. Smith*, 8 Bing. 185. But if there be any material difference between them and the particulars delivered with the declaration, or under a judge's order, the defendant should be prepared to prove the latter, if he would wish to confine the plaintiff to them in his evidence at the trial. See *Morgan v. Harris*, 2 Tyr. 385. As to particulars of set-off, it is only in case they are ordered by a judge that the defendant is bound to deliver them; but when thus ordered, and the defendant delivers them, the plaintiff's attorney is bound to annex them to the record, as above mentioned. And where, to a plea of set-off, } particulars were annexed, without any order of a judge for that purpose; and at the trial it was objected that no evidence could be given of the set-off, as the particulars were intituled in the Exchequer instead of the King's Bench: Littledale, J., held that the mistake was immaterial, as the particulars had not been delivered under a judge's order. *Lewis v. Hilton*, 5 Dougl. 267.

*Delivered under judge's order.*] In all cases where the cause of action is not fully and specifically disclosed by the declaration, or by the particulars (if any) annexed to it as above mentioned, the defendant may obtain the particulars, or further and better particulars, by application to a judge at chambers, upon summons. In actions of *indebitatus assumpsit* and debt on simple contract, the declaration being general, it is the common practice thus to obtain particulars of the plaintiff's demand. In an action against the marshal for an escape, the court have ordered the plaintiff to give the particulars of the cause of action. *Webster v. Jones*, 7 D. & R. 774. *Davis v. Chapman*, 6 Ad. & El. 767. In an action against an auctioneer, to recover a sum deposited with him on the sale of an estate, the court will order the plaintiff to give particu-

lars of any objections to the titles arising from matters of fact, but not of any objections in point of law. *Roberts v. Rolands*, 3 *Mees. & W.* 543. But in trespass, trover, or case, the court or a judge will not grant a rule or order for particulars, *Stanward v. Ullithorne*, 3 *Bing. N. C.* 326, unless the defendant by affidavit state that he does not know for what cause of action the plaintiff is proceeding. *Snelling v. Chennells*, 5 *Dowl.* 80. Nor will the court order a plaintiff to give a particular of special damage laid in his declaration. *Retallick v. Hawkes*, 1 *Mees. & W.* 573. In an action upon a warranty of a horse, also, the court refused to order a particular of the unsoundness. *Pylie v. Stephen*, 6 *Mees. & W.* 813. So in an action on a bill of exchange, where the declaration contained but one count, the court refused to order particulars, and said that it was never granted unless a very strong case were made out, showing the necessity for it. *Brooks v. Farlar*, 3 *Bing. N. C.* 291, see *Dawes v. Anstruther*, 2 *Mees. & W.* 817.

Formerly in some of the courts, the application could not be made until after the defendant had appeared. But now, by R. G. H. 2 W. 4, s. 47, "a summons for particulars and order thereon may be obtained by a defendant before appearance, and may be made, if the judge think fit, without the production of any affidavit." The only effect however, of obtaining the order, is, to stay the plaintiff's proceedings in the action, until he deliver the particulars; the defendant will not be allowed to *nonpross* him, *Burgess v. Swayne*, 7 *B. & C.* 485. *Sutton v. Clarke*, 8 *Bing.* 165. *Somers v. King*, 7 *D. & R.* 125, nor will the court discharge the defendant, if in custody, *Gratt v. Willis*, 5 *Dowl.* 715, nor, by rule or otherwise, compel him to deliver the particulars. *Kirby v. Snowdon*, 4 *Dowl.* 191. *Cane v. Spinks*, 7 *Dowl.* 27. If the defendant, after obtaining an order for particulars, abandon it, for the purpose of compelling the plaintiff to proceed in the action, it is not sufficient for him merely to give notice to that effect, he must have the order actually disposed of, by getting it rescinded. *Wickens v. Cox*, 4 *Mees. & W.* 67.

In ejectment, the court will stay the proceedings, until the lessor of plaintiff give the particulars of the premises for which the action is brought; *Doe v. Duke of Newcastle*, 7 *T. R.* 332, n.; and in ejectment for a forfeiture, until he give particulars of the breaches of covenant, &c., on which he intends to rely. *Doe v. Phillips*, 6 *T. R.* 597. But in covenant for not repairing, the court will not order the plaintiff to give particulars of the want of repairs. *Sowler v. Hitchcock*, 5 *Dowl.* 724.

*Particulars of set-off or payment.*] The court will order a defendant to deliver particulars of his set-off, in the same cases in which they would make him deliver particulars of his demand, if he had brought an action to recover the amount. If



he deliver them, the plaintiff, we have seen, *ante*, p. 252, is bound to annex a copy of them to the record, at the time he enters it with the judge's marshal.

So, where there is a plea of payment, the court will order the defendant to give the plaintiff a particular of it. *Ireland v. Thompson*, 4 Bing. N. C. 716.

*Delivery of particulars.*] The particulars delivered under a judge's order, should be made out with sufficient certainty and particularity; otherwise a judge will order the plaintiff to give further and better particulars. Giving particulars as general as the declaration itself, would be deemed a contempt of the order. *Brown v. Watts*, 1 Taunt. 353. But there is no objection to refer generally in such particulars, to an account already delivered. *Hatchet v. Marshall, Peake*, 172. Formerly it was holden that a plaintiff, in his particulars, was obliged to insert the different items on the credit, as well as on the debit side; *Mitchell v. Wright*, 1 Esp. 280. *Adlington v. Appleton*, 2 Camp. 410; but this is no longer insisted upon, see *Dict. per Patteson, J. in Smith v. Eldridge*, 1 Har. & W. 527, 5 Nev. & M. 410, 408, nor will the court compel the plaintiff to do so. *Penprase v. Crease*, 1 Mees. & W. 36. But if in his particulars he do give credit for payments, it will not be necessary for the defendant to plead them, *R. G. T. 1 Vict. and see Eastwick v. Harman*, 6 Mees. & W. 13. *Bosley v. Moore*, 8 Dowl. 375. *Morris v. Jones et al.*, 10 Law J. 165, and the particulars will be evidence of them for the defendant. *Kenyon v. Wages*, 2 Mees. & W. 764. If on the other hand the plaintiff make a mistake in his particulars, he may have leave from a judge, upon summons, to amend them. See *Staples et al. v. Holdsworth*, 4 Bing. N. C. 717. *Jones v. Corry et al.*, 9 Law J. 177, *cp.* But he cannot remedy the defect, by delivering a second particular, without a judge's order for that purpose, *Brown v. Watts*, 1 Taunt. 353, unless by consent.

The form of the bill of particulars, may be thus: "This action is brought to recover the [amount] or "balance" of the following account." Then set out the account, and conclude thus: "The above are the particulars of the plaintiff's demand in this action; and the said plaintiff intends at the trial to rely on all or every of the counts in the declaration in this cause for the recovery of the same:"—to be intituled in the court and cause, and signed and directed as an ordinary notice. If the particulars can be comprised within three folios, the copy annexed to the declaration must be given in full; if not, it may be such a statement of the cause of action as, although not stating the particulars, will show with sufficient certainty for what the action is brought. But the copy delivered under the judge's order, must show the particulars of the cause of action, fully and explicitly, as has been already mentioned. The

particulars in ejectment and other cases, can readily be framed from the above form.

If there be a mistake in the particulars as to dates, *Milwood v. Walter*, 2 Taunt. 224. *Fleming v. Crisp*, 5 Dowl. 454, or other matter, *Day v. Bower*, 1 Camp. 69, n. *Davis v. Edwards*, 3 M. & S. 380. *Harrison v. Wood*, 8 Bing. 371. *Lambirth v. Roff*, Id. 411. *Green v. Clark*, 1 Dowl. 18. *Tenny v. Moody*, 3 Bing. 3. *Spencer v. Bates*, 1 Gale, 108, which does not deceive or mislead the opposite party, it will not be deemed material. Nor can a variance between the particulars and the writ, in the cause of action, be made the subject of objection, at least before declaration. *Addis v. Jones*, 3 Dowl. 164. *S. C. nom. Davies v. Jones*, 1 Cr. M. & R. 582.

*Time for pleading after it.*] By R. G. H. 2 W. 4, s. 48, "a defendant shall be allowed the same time for pleading, after the delivery of particulars under a judge's order, which he had at the return of the summons; nevertheless judgment shall not be signed till the afternoon of the day after the delivery of the particulars, unless otherwise ordered by the judge." But where the order for particulars is refused, the practice in this respect is not so well defined or ascertained. The court of King's Bench held that the plaintiff could not sign judgment as for want of a plea, on the same day that the defendant's summons for particulars was dismissed, the plaintiff not having attended until the third summons, and being therefore the cause of the delay. *Glover v. Whatmore*, 8 D. & R. 607. But where the plaintiff attends the first summons, the defendant should in prudence be prepared to plead *instantly*, or should at least plead on the same evening. See *Hughes v. Walden*, 5 B. & C. 770.

### SECTION III.

#### *Staying proceedings.*

*Upon payment of debt, &c., and costs.*] Where an action is brought for the recovery of a debt, if the defendant be willing to pay the whole amount claimed by the declaration or particulars, a judge at chambers will make an order to stay the proceedings in the action, on payment of debt and costs. And if upon costs being taxed, the defendant fail to pay debt and costs, see *Hayman v. Bach*, 8 Moore, 102, or pay the debt but fail to pay the costs, see *Smith v. Smith*, 2 New Rep. 473, the plaintiff may proceed in the action, without making any previous demand of payment. Where a judge made an order to stay the proceedings on payment of the debt and costs by instalments, the court rescinded it, holding that he had no power to make such an order, unless by consent. *Kirby v.*

*Smith*, 2 Dowl. 218. *S. C. nom. Kirby v. Ellier*, 2 Cr. & M. 315. Where a defendant applied to stay the proceedings on payment of half the debt, and the costs, the plaintiff as to the other moiety being a trustee for a deceased person of whom the defendant was administrator; the court held that they could not grant the rule. *Barlow v. Leeds*, 1 Har. & W. 479, 5 Nev. & M. 426. So, in an action for principal and interest due on a promissory note, the defendant applied to stay proceedings on payment of the interest and costs only, the payee having indorsed on the note that if interest were paid on stipulated days during her life, the note should be given up: but the court held that they had no power to grant the rule. *Steele v. Bradfield*, 4 Taunt. 227. So, where the writ of summons was served on the 11th April, and on the 22nd May, a judge made an order to stay the proceedings on payment of the sum indorsed on the writ and costs, although the plaintiff then claimed a further sum: the court rescinded the order, holding that after four days from the service of the writ, the defendant was not entitled to a stay of proceedings upon payment of the sum indorsed, if the plaintiff claimed any further amount. *Bowdidge v. Slaney*, 2 Bing. M. C. 142. But if by the plaintiff indorsing on his writ a larger sum than is due, the defendant be misled, and prevented from settling the action, and the plaintiff afterwards claim a less sum by his particulars, the court will stay the proceedings on payment of the latter sum and the costs of the writ only, provided the application be made in time. *Elliston v. Robinson*, 2 Cr. & M. 343. The court, however, will modify the rule when circumstances require it. Where the plaintiff sued as trustee, under circumstances of some suspicion, the court stayed the proceedings on payment of the debt into court, and of the costs to the plaintiff. *Jones v. Bramwell*, 3 Dowl. 488. And where a defendant, after application by the plaintiff's attorney, paid the plaintiff the debt demanded, without knowing that a writ had been sued out, nor had the plaintiff said anything to him about it; and the attorney afterwards proceeded in the action for his costs: the court upon application stayed the proceedings without costs. *Rook v. Wasp*, 5 Bing. 190, and see *Meekin v. Whalley*, 3 Dowl. 823. *Morrison v. Summers*, 1 B. & A. 559. And on the other hand, as this order to stay proceedings is a matter of favour, not of right, the judge in granting it may put the defendant under such terms as the justice of the case may require. *Jones v. Shepherd*, 3 Dowl. 421. But in no case will the court stay the proceedings, merely upon an affidavit showing that there is no debt due, or otherwise negating the cause of action. *Smith v. Curtis*, 2 Dowl. 223. Nor will the court stay the proceedings, upon payment of a sum of money in an action of assumpsit for unliquidated damages. *Fisher v. Pyne et al.*, 1 Man. & Gr. 265.

If a defendant apply to stay proceedings upon payment of a less sum than that claimed, and upon such sum being refused he pay it into court, and plead it, and the plaintiff afterwards accept it in satisfaction; the plaintiff in that case will be entitled to costs only up to the time of the application, and not to the time of paying the money into court, and the court will give the defendant the costs subsequently incurred by him in the action. *James v. Raggett*, 2 B. & A. 776. This is done upon the presumption that the plaintiff proceeded in the action, after the application, merely for the purpose of oppressing the plaintiff, and making costs. *Per Parke, B., Gower v. Elkins*, 6 Dowl. 335. But if that presumption be rebutted by affidavit, as for instance, if it appear that after action brought, and the application made, something occurred which rendered it unnecessary for the plaintiff to proceed to trial on a special count in his declaration, all he claimed on the other counts having been paid into court, or the like, the court will not give the defendant his costs subsequently incurred, but will allow the plaintiff to have his costs as in ordinary cases. *Cumming v. Columbine*, 6 Dowl. 373. And the application, even in cases where the court will grant it, cannot be made until after the plaintiff has declared, *Reynolds v. Sherwood*, 8 Dowl. 183, 9 Law J. 136, *ex.* and the money have been paid into court. *Gover v. Elkins*, 3 Mees. & W. 216, 6 Dowl. 335.

By making the application to stay proceedings upon payment of debt and costs, or even obtaining the order, the defendant does not waive his right to object to any previous proceeding which is void, and not merely an irregularity. *See Siggers v. Sansom*, 2 Dowl. 745.

In actions upon bills of exchange or promissory notes, the court will stay the proceedings upon payment of the amount of the bill or note, with interest, and the costs in that action. *Smith v. Woodcock*, 4 T. R. 691. Formerly, in actions against the acceptor of a bill or maker of a note, the court, in addition, required him to pay the costs in any other actions which might have been brought by the same plaintiff against other parties to the bill or note; *Id. per Cur.*; unless it appeared clearly that the other actions were brought for the purpose of creating costs, or the like. *Hodson v. Gunn*, 2 D. & R. 57. But now, by R. G. T. 1 Vict. it is ordered, "that in future, in any action against an acceptor of a bill of exchange, or the maker of a promissory note, the defendant shall be at liberty to stay the proceedings, on payment of the debt and costs in that action only." If, however, after payment of the bill by one of the other parties, the acceptor insist on the plaintiff proceeding in his action against him, intending to contest his liability, he has a right to do so, and the court will not interfere to prevent him. *Lewis v. Dalrymple*, 3 Dowl. 433.

In debt on bond, conditioned for the payment of a principal sum with interest, the court will stay the proceedings on payment of the principal, interest, and costs; but they will not stay the proceedings upon payment of the interest and costs only, although the breach stated be merely the nonpayment of the interest, at least not until after judgment. *Vansandau v. —*, 1 B. & A. 214, but see *Tighe v. Crafter*, 2 Taunt. 387, *semb. cont.* In debt on bond, where no interest is recoverable, such as a bastardy bond, or the like, the proceedings will be stayed on payment of the penalty and costs. *Wilde v. Clarkson*, 6 T. R. 303. *Shutt v. Proctor*, 2 Marsh. 226. In debt on replevin bond, the proceedings will be stayed on payment of the value of the goods distrained, (or if that exceed the rent due, then the amount of the rent,) and the costs in the replevin suit, and in the action on the bond; *Hunt v. Round*, 2 Dowl. 558; and the court will refer it to the master, to ascertain the value of the goods, if necessary. *Gingell v. Turnbull*, 3 Bing. N. C. 881. In debt on bail bond, the proceedings will be stayed on payment of the debt and costs in the original action, (not exceeding the penalty of the bond), and the costs in the action on the bond. *Ante*, p. 171. In debt or *scire facias* against bail, the court or a judge will stay the proceedings on payment of the sum mentioned in the affidavit of debt, and the costs in the original action (not exceeding together the amount of the recognizance), with the costs of the action, or *sci. fa.* against the bail. *Vansandan v. Nash*, 2 Dowl. 767. See *ante*, p. 201. *Clarke v. Bradshaw*, 1 East, 86. *Pengal v. Mellish*, 5 T. R. 363.

In debt on judgment, the court have stayed the proceedings, on payment of the amount of the judgment and costs; *Thomas v. Edwards*, 2 Anst. 558, and see *Simpson v. Stone*, 2 W. Bl. 785; and they would probably now stay the proceedings, without costs. See *stat.* 43 G. 3, c. 46, s. 4.

In detinue or trover for title deeds, if no special damage be alleged, the court in fit cases will stay the proceedings, on delivering up the deeds and payment of costs. Or if the defendant wish to deliver up part of the deeds, having a lien on the remainder, or the like, he will in fit cases be allowed to do so, and the court will order that if the plaintiff thereupon consent to stay the proceedings, he shall be paid his costs up to that time, otherwise that the deeds returned shall be struck out of the declaration. *Phillips v. Hayward*, 3 Dowl. 362.

So, in trespass for taking goods, where no special damage was laid, the court have ordered that on restoring the goods and paying costs, the proceedings should be stayed. *Pickering Trustee*, 7 T. R. 53. But they have refused to do so, upon payment of the sum for which the goods sold, or even upon restoring the goods, where the parties could not thereby be placed in as good a situation as before the goods were taken.

*Gibson v. Humphrey*, 1 Cr. & M. 544, and see *Knot v. Barker*, 3 Anst. 896. *Woodgate v. Baldock*, Id. 256. So, where the sheriff removed and sold goods under a *fi. fa.* without paying the rent due to the landlord, of which he had notice, and the landlord brought an action against him: the court refused to stay the proceedings, on payment of the sum for which the goods were sold. *Calvert v. Joliffe*, 2 B. & Ad. 418.

So, in replevin, if the defendant wish to stay the proceedings, the court, if no special damage be laid, will allow him to do so, on payment of the costs of the action and replevin, and delivering up the replevin bond. *Banks v. Brand*, 3 M. & S. 525. If the plaintiff wish to stay the proceedings, the court will stay them on payment of the rent, and single costs up to the time of the application. *Hopkins v. Shrole*, 1 B. & P. 382. *Vernon v. Wynne*, 2 H. Bl. 24. *Anon.* 1 Ld. Raym. 429.

*Pending error.*] In what cases the court will stay the proceedings in an action on the judgment in the original action, pending error, see *post*, tit. "Error." Bail in error must first be put in and perfected, before the application can be made. *Abraham v. Pugh*, 5 B. & A. 903. The court, however, will not stay proceedings in an action on a foreign judgment, merely because an appeal is pending upon the judgment in the foreign court. *Aliwen v. Furnival*, 3 Dowl. 202.

In what cases the court will stay proceedings against the bail in the original action, pending error, see *post*, tit. "Error;" and see *Riston v. Francis*, Str. 877. *Copons v. Blyton*, 1 New Rep. 67. *Sprang v. Montprivatt*, 11 East, 316.

*Where two or more actions are brought for the same cause.*] If two actions, for the same cause of action, between the same parties, be pending at the same time in any of the courts at Westminster, the court in which the second action is pending, will in general, upon application, stay the proceedings in it. Where three several ejectments, upon the same title, were brought in the court of King's Bench, and that court stayed the proceedings in two of them, and permitted the party to proceed in the third, but upon such terms that it was probable he would ultimately have to pay the costs; he then brought an ejectment for the same property in the Common Pleas, and that court upon application stayed the proceedings. *Doe v. Brenton*, 6 Bing. 469. But where it appeared that the first action had been brought by an attorney, wholly unauthorized to do so by the plaintiff, the court refused to stay the proceedings in the second action, as the plaintiff could have no control over the first. *Souter v. Watts*, 2 Dowl. 263. Where a plaintiff, suing on a bill of exchange, deposited it with J. S., at the same time informing him of the action, and J. S. afterwards brought an action upon it against the same defendant,

the court refused to stay the proceedings in the first action; but it seems they would have stayed the proceedings in the action by J. S., as he had notice of the action already pending, at the time the bill was deposited with him. *Marsh v. Newell*, 1 *Taunt.* 109. But the court refused to stay the proceedings in an action, merely because a previous suit to try the title to the same property was pending in the mayor's court of London, by foreign attachment. *Smidt v. Ogle*, 6 *Taunt.* 74. Nor will the court stay the proceedings in an action, merely because the plaintiff has filed a bill in equity for discovery and relief respecting the same matter. *Murphy v. Cadell*, 2 B. & P. 137. So, where two actions were brought against the owners of a ship, by different persons, for damage by her running down another ship, and one of the causes being tried, the defendants had a verdict: the court refused to stay the judgment and execution in that action, until the other action should be tried, although it was sworn that material evidence would be adduced at the latter trial, which could not be had at the former. *Yates et al. v. Dublin Steam Packet Comp.*, 6 *Mees. & W.* 77. So, where it was sought to stay proceedings in an action, on the ground that a former action for the same debt had been settled by the defendant's paying the debt and costs: the court refused to interfere, saying that they would not try upon affidavits whether the two actions were for the same debt; it was the subject of a plea to the action, and not of an application to stay the proceedings. *Ross v. Jacques*, 8 *Mees. & W.* 135, 10 *Law J.* 306, *ex.* And the court have refused to make a plaintiff, who had an action and an indictment pending against the defendant for the same assault, elect as to which he would prosecute. *Jones v. Clay*, 1 B. & P. 191.

Where several actions were brought against several persons, for the same debt, who (if liable at all) were liable jointly, and the defendant in one action paid the debt and the costs in that action: the court upon application stayed the proceedings in the other actions, without costs. *Carne v. Legh*, 6 B. & C. 124. As to staying proceedings in several actions on the same bail bond, on payment of the debt, and the costs in one, *see ante*, p. 171.

Where a man, having a right to sue several persons for one specific damage, recovers and receives satisfaction in an action against any one of them, that is a bar to an action against any of the others; *Bird v. Randall*, *Burr.* 1354; and if an action be brought against any of the others, the court upon application will stay the proceedings. *Semb. Id.* So, if a man bring an action against another, and from some mistake or omission recover only nominal damages, if he bring another action against the same party for the same cause of action, the court will stay the proceedings. *Longridge v. Brewer*, 1 *Bing.* 307. So, proceedings in an action of trespass have been stayed,

the plaintiff having recovered in replevin for the same cause of action. *Lamb v. Nutt*, 1 *Tidd*. 572. So, where at the trial of a cause, a juror was withdrawn at the suggestion of the judge, and the plaintiff afterwards commenced another action for the same cause, the court upon application stayed the proceedings. *Moscatti v. Lawson*, 1 *Har. & W.* 572. But if the second action be not for the same cause, the court will not interfere, however vexatious the action may be. See *Dicas v. Jay*, 6 *Bing.* 519. And where a client brought an action against his attorney for negligence, and recovered; and the attorney then brought an action against the client for the amount of his costs in the same transaction: the court refused to stay the proceedings in the latter action. *Smith v. Rolt*, 2 *Dowl.* 62. As to such applications in *qui tam* actions, see *Harrington v. Johnson*, *Corp.* 744: and see *Pechell v. Layton*, 2 *T. R.* 512, 712.

[In a second action, until costs of the former be paid.] If a man claiming title to lands, bring ejectment, and fail, and afterwards bring another ejectment, the court will in general stay the proceedings in the second action, until the costs of the first shall be paid. And whether the second action be upon the demise of the same party or of his heir, *Doe d. Feldon v. Roe*, 8 *T. R.* 645. *Doe v. Harland, et al.*, 10 *Ad. & El.* 761, or other person claiming through him, such as his assignee, &c. *Doe v. Law*, 2 *W. Bl.* 1180. *Doe d. Standish v. Roe*, 5 *B. & Ad.* 878, or whether others may have been added as lessors in the second action, or not, *Fairclaim v. Thrustout*, 8 *T. R.* 646, *cit.*, or whether the second action be against the same or a different defendant, or for the same or different premises, provided it appear to be brought to try the same title in substance, *Keene v. Angel*, 6 *T. R.* 740. *Doe v. Shadwell*, 7 *Dowl.* 527. *Doe v. Harland*, 10 *Ad. & El.* 761, or whether the second action be brought in the same or a different court, *Doe v. Stevenson*, 3 *B. & P.* 22,—is immaterial. And they have done this, although the first action was discontinued before the lessor of the plaintiff had entered into the consent rule, *Smith v. Barnardiston*, 2 *W. Bl.* 904. *Doe v. Langdon*, 5 *B. & Ad.* 864, and although many years had intervened between the first and second action. *Keene v. Angel*, 6 *T. R.* 740. *Doe v. Law*, 2 *W. Bl.* 1158. So, if a party bring an ejectment, and succeed, and his opponent afterwards bring another ejectment against him to recover back the premises, the court will stay the proceedings in the latter action, until the plaintiff's costs of the first action be paid. *Thrustout v. Holdfast*, 6 *T. R.* 223. They have also, in such a case, stayed the proceedings, until not only the costs of the former ejectment, but also the costs of an action thereon for mesne profits should be paid; *Doe d. Pinchard v. Roe*, 4 *East*, 585; but they will not stay the proceedings until the damages in the action



for mesne profits, *Doe v. Barclay*, 15 East, 233, or the costs in a writ of right or suit in equity for the same premises, *Doe v. Winch*, 3 B. & A. 602, and see *Bowyear v. Bowyear*, 2 Dowl. 207, be paid. Nor will they stay the proceedings at all in the second action, if there be reason to think that the defendant obtained the former verdict by fraud and perjury; *Doe v. Thomas*, 2 B. & C. 622; and if the case be doubtful, the court will refer the matter to the master. *Id.* And where a party brought ejectment and succeeded, and the tenant afterwards brought a cross action of trespass for taking certain of his goods upon the premises: Littledale J. refused to stay the proceedings in the latter action, until the costs of the ejectment should be paid. *Carnaby v. Welby et al.*, 1 Dowl. 315. Nor will the court stay the proceedings in a second ejectment, until the costs of the day in a former ejectment at the suit of a third party, who had withdrawn his record, be paid. *Doe d. Standish v. Roe*, by Wightman J., MS. T. 1842. This application to stay proceedings cannot be made until after the defendant has entered into the consent rule. *Doe d. Crockett v. Roe*, 1 Har. & W. 351. In strictness, it should be made within a reasonable time after the commencement of the second action; but where the declaration was served in September, and between Michaelmas and Hilary terms there was an unsuccessful application to a judge, and the application was made to the court on the fifth day of Hilary term, it was holden not to be too late. *Doe v. Packer*, 2 Dowl. 373, 2 Cr. & M. 457. After the court have granted the rule, they will not afterwards grant another, directing that unless the costs be paid within a certain time, a *nonpros* shall be entered; *Doe v. Ridgway*, 5 B. & A. 525; nor will they make that part of the terms of the original rule.

So, in trespass for seizing goods, the court have stayed the proceedings, until the costs of a nonsuit in a former action for the same cause were paid. *Weston v. Withers*, 2 T. R. 571. And the like, in an action for a malicious prosecution, *Baldwin v. Richards*, *Id. cit.* And see *Milehart v. Halsea*, 3 Wils. 149, and in an action against commissioners of bankrupt for a wrongful committal; *Crawley v. Impey*, 8 Taunt. 407; and they have stayed the proceedings in an action by husband and wife, until the costs of a former action by the husband alone, for the said cause, should be paid. *Lampley v. Sands*, 1 T. R. 584. But they have refused to stay the proceedings in a *quiam* action, until the costs of a former action for the same penalties by another party, were paid; *English v. Cox*, *Comp.* 322; they have also refused it, where the plaintiff was in prison, in execution for the costs of the first action. *Beaves v. Robins*, 8 D. & R. 42. Nor will they do it, where the first action was merely nonprossed, *Liversedge v. Goode*, 2 Dowl. 141. *Pashley v. Poole*, 3 D. & R. 53, or discontinued,

or the proceedings set aside. *Dawson v. Sampson*, 2 Chit. 146. Also, they have refused to stay the proceedings in an action by A. against B., until the debt and costs recovered in a former action by B. against A. should be paid. *Cook v. Dobree*, 1 H. Bl. 10.

*In ejectment by mortgagee or landlord.*] If, at any time pending an ejectment by a mortgagee to recover the mortgaged premises, (where no suit in equity for foreclosure or redemption shall be depending), the party having a right to redeem shall pay to the mortgagee, or (in case of his refusal) shall pay into court the principal and interest due upon the mortgage and the costs, the court shall stay the proceedings, and order a reconveyance, &c. 7 G. 2, c. 20, s. 1. See *Goodtitle v. Pope*, 7 T. R. 185. *Goodtitle v. Lansdown*, 3 Anst. 937. *Doe d. Tubb v. Roe*, 4 Taunt. 887. *Doe v. Steel*, 1 Dowl. 359. The costs in this case are taxed as between party and party, and not as between attorney and client. *Doe v. Capps*, 3 Bing. N. C. 768.

So, if at any time before trial of an ejectment for nonpayment of rent, the tenant or his assignee pay or tender to the landlord, or pay into court, all arrears of rent, and costs, all further proceedings shall cease. 4 G. 2, c. 28, s. 4. See *Goodright d. Sterenson v. Noright*, 2 W. Bl. 746. *Doe v. Masters*, 2 B. & C. 490. *Doe d. Harcourt v. Roe*, 4 Taunt. 883. The court however cannot do this, after execution, *Doe d. Lambert v. Roe*, 3 Dowl. 557, or even after trial; *Roe v. Davies*, 7 East, 363; nor will they, after the landlord has obtained possession, compel him to pay over the value of the crops to the tenant, deducting the rent. *Doe v. Witherwick*, 3 Bing. 11. Under this statute, the mortgagee of the tenant has the same title to relief, as the tenant against whom the ejectment is brought. *Doe d. Whitfield v. Roe*, 3 Taunt. 402. But although the court are thus empowered to interfere where the forfeiture is for nonpayment of rent, they have no authority to do so, where the forfeiture is by breach of a covenant to repair. *Doe v. Asby*, 10 Ad. & El. 71, 8 Law J. 207, qb.

*In actions brought in the name of another.*] Where a wife, living separate from her husband, brings an action in his name, without his authority, the court on application will stay the proceedings, until the wife give the husband an indemnity, to the satisfaction of the master, against costs. *Morgan et ux. v. Thomas*, 2 Cr. & M. 388. See *Chambers v. Donaldson*, 9 East, 471. *Harrison et ux. v. Almond*, 1 Har. & W. 519, 4 Dowl. 321. So if one of two partners become bankrupt, and the other make use of the names of the assignees jointly with his own, in an action against a debtor of the firm, the court will order the solvent partner to give the assignees an indemnity. See *Whitehead et al. v. Hughes*, 2 Cr. & M. 318. So, where

the assignee of an insolvent, who was *cestui que trust*, brought an action in the names of the trustees, first tendering an indemnity as to costs, the court of Exchequer stayed the proceedings, until the plaintiffs should be indemnified to the satisfaction of the master. *Spicer v. Todd*, 2 *Crompt. & J.* 165. In strictness in these cases there ought to be a demand of indemnity, before any application is made to the court, otherwise, at least, the court will not give the plaintiff his costs.

*In actions under 40s.]* Where an action is brought in one of the superior courts for a sum under 40s. (*see* 6 *Ed. 1, c. 4*), and this appears from the admission of the plaintiff, *Melton v. Garment*, 2 *New Rep.* 84, or of his attorney, *Kennard v. Jones*, 4 *T. R.* 495, or from the affidavit of the defendant contradicted by the plaintiff, *Wellington v. Arters*, 5 *T. R.* 64, but *see* *Lowe v. Lowe*, 1 *Bing.* 270. *Oulton v. Perry*, 3 *Burr.* 1592, the court will stay the proceedings, unless the cause of action be a debt, and there appear to be no remedy for it elsewhere. *Harwood v. Lester*, 3 *B. & P.* 617. *Eames v. Williams*, 1 *D. & R.* 359.

*In other cases.]* Where the assignees of a bankrupt under a separate commission had obtained a verdict, after a joint commission had issued, and pending a petition to supersede the separate commission: the court, upon application, ordered execution to be stayed, and the money to be brought into court. *Hodgkinson v. Travers*, 1 *B. & C.* 257.

If an action of ejectment be commenced, without the knowledge or authority of the lessor of the plaintiff, the court will stay the proceedings. *Doe d. Baker v. Roe*, 3 *Dowl.* 496. And *see* *Newton v. Matthews*, 4 *Dowl.* 237. And where, pending an action, reports reached this country of the death of the plaintiff, the court, on application of the defendant, (the plaintiff's attorney not opposing it,) stayed the proceedings until the court or a judge should direct the action to proceed. *Chesser v. Ridgway*, 1 *Man. & Gr.* 955.

Where a person, indicted for felony, sued a banker for money he had deposited with him, and which was thought to be the produce of the felony: the court upon application stayed the proceedings, to give time for the trial of the indictment. *Deakin v. Praed*, 4 *Taunt.* 825.

But the court have refused to stay the proceedings in an action, until after the trial of an indictment for perjury, founded upon the affidavit to hold to bail, *Johnson v. Wardle*, 3 *Dowl.* 550, or preferred against one of the plaintiff's witnesses. *Warwick v. Bruce*, 4 *M. & S.* 140. And in action for slander, imputing felony, where the plaintiff obtained a verdict, the court refused to stay judgment or execution, although it appeared that the plaintiff had since been convicted of the

felony imputed to him, it appearing also that the defendant was examined as a witness against him. *Symons v. Blake*, 2 Cr. M. & R. 416.

The court have also refused to stay judgment and execution, on the ground that the plaintiff, after verdict, had become an alien enemy; *Vanbrynen v. Wilson*, 9 East, 321; or on the ground that the defendant had filed a bill for an injunction, and expected to obtain it in a few days. *Vandersteyers v. Witham*, *Mees. & W.* 457.

## SECTION IV.

## Oyer.

Wherever a deed is pleaded with profert, whether rightly so pleaded or not, the opposite party is entitled to oyer of it, that is to say, to have a copy of it delivered to him; and he is not bound to plead without it. See 1 Saund. 9, a. and see *Thousby v. Sparrow*, 1 Wils. 16, and *Arch. Pl. & Ev.* 168. He must demand it, however, during the term in which the deed is pleaded, *R. v. Amery*, 1 T. R. 149, or, if the deed be pleaded in vacation, during the following term; *Semb.*; also he must demand it, before his time for pleading, &c. has expired, and before the other party is entitled to sign judgment for his default in not doing so; *Gerard v. Early*, 2 Wils. 413. *Sparkes v. Simpson*, 2 B. & P. 379. *Goodricke v. Turley*, 2 Cr. M. & R. 694, *Dowl.* 431; otherwise the other party may refuse to grant oyer, and the court will not compel him to do so. And where oyer was demanded within this time, by the defendant in an action on a bail bond, but the plaintiff refused to grant it, and the defendant, being obliged to plead, in order to prevent judgment being signed against him, pleaded a plea which did not require oyer, namely, that there had been no assignment of the bail bond: the court held that by thus pleading, he had not waived his right to oyer. *Goodricke v. Turley*, *supra*. Also in an action by an executor, where oyer was demanded of the letters testamentary, and oyer was accordingly given of the letters, but not of the will, the court held that oyer should also have been given of the will, and that the defendant was not bound to plead without it; and judgment having been signed for want of a plea, the court set it aside for irregularity with costs. *Daley v. Mahon*, 4 Bing. N. C. 235. The demand should be in writing, in this or the like form: "*The defendant craves oyer and copy of the [writing obligatory and of the condition thereof,*" or "*indenture of lease,*" &c.] mentioned in the declaration in this cause: Or, *The plaintiff craves oyer and copy of the [indenture of lease, &c.] mentioned in the defendant's plea in this cause* :—to be intituled in the court and cause, and signed and directed as ordinary notices in a cause.

If oyer be demanded of a plaintiff, and he refuse to give it where it is legally demandable, the refusal is error; but in order to bring error, the party must enter his prayer of oyer on record, to which the other party may counterplead or demur, and thereupon the court give judgment. 1 *Saund.* 9, b. and see *Goodricke v. Turley*, 2 Cr. M. & R. 694. On the other hand, if oyer be demanded of a defendant, he has two clear days to deliver it; but if he refuse or neglect to deliver it within that time, the plaintiff may treat his plea, &c. as a nullity, and sign judgment. *Page v. Divine*, 2 T. R. 40.

A defendant, who demands oyer, has the same time for pleading after it is granted, as he had at the time he demanded it. *Webber v. Austin*, 8 T. R. 356. *Theadom v. Jackson*, Barnes, 238. *Simpson v. Daffido*, Id. 254. The party craving it, must, where it is granted, set it out at the head of his pleading; if he plead without doing so, the other party may pray that the deed &c. be enrolled, and so make it part of the record. *Smith v. Jennings*, 9 Dowl. 155. If a defendant after craving oyer of a deed, omit to insert it at the head of his plea, the plaintiff on making up the issue or demurrer book, may, if he think fit, insert it for him; but the costs of such insertion shall be in the discretion of the taxing officer. *R. G. H.* 2 W. 4, s. 44. Or if the plaintiff crave oyer of any deed mentioned in the plea, and after having obtained it, reply without setting it out, if his replication conclude to the country, he cannot add the similitur, and proceed to trial; if he do, his proceedings may be set aside for irregularity. *Smith v. Jennings*, *supra*.

## SECTION V.

*Interpleader, in ordinary cases.*

*The statute.*] By stat. 1 & 2 W. 4, c. 58, s. 1, reciting that "it often happens that a person sued at law for the recovery of money or goods wherein he has no interest, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claims, but by a suit in equity against the plaintiff and such third party, usually called a bill of interpleader, which is attended with expense and delay:" it is enacted "that upon application made by or on behalf of any defendant, sued in any of his majesty's courts of law at Westminster, or in the court of Common Pleas of the county palatine of Lancaster, or the court of Pleas of the county palatine of Durham, in any action of assumpsit, debt, detinue or trover, such application being made after declaration and before plea, by affidavit or otherwise, showing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is

claimed or supposed to belong to some third party, who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into court, or to pay or dispose of, the subject-matter of the action, in such manner as the court or any judge thereof, may order or direct:—it shall be lawful for the court or any judge thereof—

1. "To make rules and orders calling upon such third party to appear, and to state the nature and particulars of his claim, and maintain or relinquish his claim ;"

2. "And upon such rule or order, to hear the allegations, as well of such third party, as of the plaintiff, and in the meantime to stay the proceedings in such action ;"

3. "And finally to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues, and also to direct which of the parties shall be plaintiff or defendant on such trial ;"

"Or, with the consent of the plaintiff or such third party, their counsel or attornies, to dispose of the merits of their claims, and determine the same in a summary manner."

4. "And to make such other rules and orders therein, as to costs and all other matters, as may appear to be just and reasonable."

By sect. 2, "the judgment in the issue or action, and the decision of the court or judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from or under them."

By sect. 3, "if such third party shall not appear upon such rule or order, to maintain or relinquish his claim, being duly served therewith ; or shall neglect or refuse to comply with any rule or order to be made after appearance : it shall be lawful for the court or judge to declare such third party, and all persons claiming by, from or under him, to be for ever barred from prosecuting his claims against the original defendant, his executors or administrators ; saving nevertheless the right or claim of such third party against the plaintiff ; and thereupon to make such order between such defendant and the plaintiff, as to costs and other matters, as may appear just and reasonable."

By sect. 4, it is provided "that every order to be made in pursuance of this act, by a single judge not sitting in open court, shall be liable to be rescinded or altered by the court, in like manner as other orders made by a single judge." Or, by sect. 5, "if upon application to a judge in the first instance, or in any later stage of the proceedings, he shall think the matter more fit for the decision of the court, it shall be lawful for him to refer the matter to the court ; and thereupon the

court shall and may hear and dispose of the same, in the same manner as if the proceeding had originally commenced by rule of court, instead of the order of a judge."

By sect. 7, "all rules, orders, matters and decisions to be made and done in pursuance of this act, except only the affidavits to be filed, may, together with the declaration in the cause (if any), be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by any such rule or order; and every such rule or order so entered, shall have the force and effect of a judgment, except only as to becoming a charge upon any lands, tenements, or hereditaments; and in case any costs shall not be paid within fifteen days after notice of the taxation and amount thereof given to the party ordered to pay the same, his agent or attorney, execution may issue for the same by *fi. fa.* or *ca. sa.* adapted to the case, together with the costs of such entry, and of the execution if by *fi. facias*; and such writs may bear teste on the day of issuing the same, whether in term or vacation."

*Application, in what cases.]* The statute gives jurisdiction to the court in assumpsit, debt, detinue and trover only; and therefore where the declaration against the applicant contained a count in case, as well as a count in trover, the court held that they had no jurisdiction; as they must decide upon the whole matter, and had no jurisdiction over the count in case, they could not interfere. *Lawrence v. Matthews*, 5 Dougl. 149, 2 Har. & W. 123. Where trover was brought for title deeds, by the heir of a mortgagee against a person in whose custody they were, and they were also claimed by a devisee, the court at first granted the defendant a rule nisi, drawn up to show cause at chambers; but afterwards Parke, B., at chambers, upon consideration of the first section of the statute, held that trover for title deeds was not within it, and the rule was accordingly discharged. *Smith v. Wheeler*, 1 Gale, 15, 163. Where trover was brought by the assignees of A. against B. and C. for some oil which A. had deposited with B.; B. disclaimed all interest in the oil, but as C. had given him notice that he claimed a lien upon it for 50*l.*, and threatened to take proceedings against him if he delivered it up, B. applied to the court under this act; the court ordered that the oil should be delivered up to the plaintiffs, they paying 50*l.* into court, and directed an issue to decide C.'s claim, C. to be plaintiff, and the assignees defendants. *Gladstone v. White et al.*, 1 Hodg. 386. Where an uncertificated bankrupt did work for the defendant, and the price being left to arbitration, an award was made in his favour for a certain amount, which however was claimed by his assignees, who

gave the defendant notice not to pay it; the bankrupt then brought an action against the defendant for the amount, and the court, upon application, granted an interpleader rule under this statute. *Jones v. Turnbull*, 2 *Mees. & W.* 601. So, where A., the holder of a bill of exchange, lost it, or it was stolen from him, and he gave notice to the acceptor not to pay it; when it became due it was presented for payment by B., and the acceptor not paying it, B. brought an action against him; A. also brought an action against him on the bill: on application by the acceptor, the court granted a rule of interpleader upon this statute, and after hearing the parties, ordered an issue to be tried between A. and B. *Regan v. Serle et al.*, 9 *Dowl.* 193. But where a party having purchased cattle, accepted a bill drawn in blank for the amount, and sent it to A. the seller; when the bill became due, it was in the hands of B. for valuable consideration, and purported to be drawn and indorsed by A., but A. alleged that his name was forged to it; A. then brought an action for the price of the cattle, and B. threatening an action on the bill, the acceptor moved for a rule under this act: but the court refused it, saying that it was not clear that he was not liable to both A. and B.,—to A. if the name were a forgery, and to B. as having actually accepted the bill. *Farr v. Ward*, 2 *Mees. & W.* 844. So, where a promissory note was placed in the hands of a trustee, who afterwards brought an action on it, and the cestui que trust also threatened to sue, Coleridge, J., refused the rule. *Newton v. Moody*, 7 *Dowl.* 582. So, where the defendant, having bought a rick of hay from the plaintiff (who was executor *de son tort* of A.), was applied to for the price by a person who claimed to be administrator of A., and upon being sued by the plaintiff, applied for an interpleader rule under this act: the court refused it, saying that as he entered into the contract with the plaintiff, he must pay him, or show by plea some good reason why he did not. *James v. Pritchard*, 7 *Mees. & W.* 216, 10 *Law J.* 92, *ex.* So, where a reward, advertised to be paid on the conviction of a felon, was claimed by two parties, one of whom brought an action to recover it, and the defendant applied to the court under this act: the court held that it was not a case within the statute, as possibly neither party was entitled to it. *Collis v. Lee*, 1 *Hodg.* 204. *Grant v. Fry*, 4 *Dowl.* 135. So, where the action was brought for unliquidated damages, it was holden not to be within the act. *Walter v. Nicholson*, 6 *Dowl.* 517. Where, upon showing cause against a rule upon this statute, it appeared that the action was then stayed by injunction, the court discharged the rule. *Arayne v. Lloyd*, 1 *Bing. N. C.* 720, 1 *Hodg.* 166. And where it appeared that an action against the party was only threatened, but not actually commenced, it was holden that the court had no authority to entertain the application, the statute requiring it to be made after declara-



tion and before plea. *Parker v. Linnett*, 2 Dowl. 562. The court also will not entertain the application, if it appear that the applicant has been indemnified; *Tucker v. Morris*, 1 Dowl. 639; but they will, where it appears that the applicant has a lien upon the thing claimed, if he consent to relinquish his lien. *Cotter v. Bank of England*, 2 Dowl. 728.

*To what court, and how.*] The application may be made to the court, or to a judge at chambers: if made to the court, it must be made to that court in which the action against the applicant is pending; and if two actions be brought against him by different claimants, in different courts, an application must be made to each court. *Allen v. Gilby*, 3 Dowl. 143. The rule calls upon the claimant to appear and state the nature and particulars of his claim, and to maintain or relinquish the same. In the Exchequer, if it be intended that the rule *nisi* should be drawn up as a stay of proceedings, a previous notice of the motion must be given to the opposite parties; *Smith v. Wheeler*, 3 Dowl. 431; and the same in the court of Common Pleas; but in the court of Queen's Bench such notice is not necessary. If the application be made so late in the term, that cause cannot be shown in court during that term, the court may allow the rule to be drawn up to show cause before a judge at chambers. *Smith v. Wheeler*, *supra*.

*Rule, how disposed of.*] If the claimant do not appear and show cause against the rule, he will be barred of his claim as against the applicant, and the matter in dispute will be ordered to be handed over to the plaintiff. See *sect. 3, ante*, p. 267. But if the claimant appear, and persist in his claim, the court will either order that he be made defendant in the action already pending, instead of the applicant, or will direct an issue between the plaintiff and the claimant, to try the right, and will give orders for the safe custody of the matter in dispute, in the meantime. See *Allen v. Gilby*, 3 Dowl. 143.

*Issue, &c.*] Where a claimant, ordered to be plaintiff in such an issue, refused to proceed in it, and it was proposed to substitute the name of another claimant for his, Coleridge, J., held that it could not be done, without making such other claimant a party to the rule. *Lydal v. Biddle*, 5 Dowl. 244. Where such an issue is ordered and tried, judgment must be actually signed in it, before the party succeeding can apply to the court to have the disputed property handed over to him. *Cooper v. The Lead Smelting Company*, 1 Dowl. 728. And the judgment must be entered in the manner pointed out in *sect. 7, ante*, p. 268, *Dickinson v. Eyre*, 7 Dowl. 721, and according to its true date. *Lambirth v. Barrington*, 4 Dowl. 126. If the plaintiff in the issue, however, neglect to proceed to the

trial of it, the other party may apply to have the money or other property in dispute; but the rule in such a case, is a rule *nisi* only. *Stanley v. Perry*, 1 *Har. & W.* 669.

*Costs.*] As in courts of equity, upon a bill of interpleader, if it appear that the plaintiff acted fairly with respect to the fund in dispute, he is allowed his expenses out of it, the courts of law, in analogy to this, will allow an applicant under this statute his costs under similar circumstances. *Duear v. Mackintosh*, 2 *Dowl.* 730. *Pitchers v. Edney*, 4 *Bing. N. C.* 721. and see *Cotter v. Bank of England*, *Id.* 728. *Parker v. Linnett*, *Id.* 562. But where it appeared that one of the parties had offered to indemnify the applicant, before he made his application, the court refused to allow him his costs. *Gladstone v. White et al.*, 1 *Hodg.* 386. So, where the third party abandoned his claim, the court refused to allow the applicant his costs out of the fund. *Murdock v. Taylor*, 9 *Law J.* 188, *cp.* And where it appeared that the applicant had no ground for believing that he should be sued by the alleged claimant, the latter having desired him to pay the money in dispute to the plaintiff, the court discharged the rule with costs. *Harrison v. Payne*, 2 *Hodg.* 107. As to the costs between the plaintiff and the claimant, the court usually order them to abide the event of the action or issue. See *Barnes v. Bank of England*, 7 *Dowl.* 319. *Jones v. Regan*, 9 *Dowl.* 580. But where the applicant paid the sum of 492*l.* into court, 183*l.* of which was claimed by A., and the whole claimed by the assignees of B., and upon an issue to try the claim of A., he obtained a verdict for 50*l.* only, and a judge at chambers thereupon ordered each party to pay his own costs: the court refused to rescind the order. *Carr v. Edwards*, 8 *Dowl.* 29. As to the remedy for costs, see sect. 7, *ante*, p. 268.

## SECTION VI.

## Plea.

1. *Form, &c. of pleas.*

*Title and commencement.*] The plea must be correctly intitled in the court. It must also be intitled of the day of the month and year when pleaded, and of no other time, *R. Pl. H.* 4 *W.* 4, *I. s.* 1, and must have the words "in the year of our Lord" before the year; *Holland et al. v. Tealdi*, 8 *Dowl.* 320; otherwise it may be set aside for irregularity. *Hodson v. Pennell*, 4 *Mees. & W.* 373. It shall commence thus: *The said defendant by — his attorney or in person &c. says that —*. *Id. s.* 10. And it is not necessary to insert the allegation of *actionem non* in the commencement, or a prayer of judgment

in the conclusion, unless the plea be pleaded to part of a count only. See *R. Pl. H. 4 W. 4, I. s. 9. Bird v. Higginson, 2 Ad. & E. 696.* The name of the cause must be inserted in the margin: but it is sufficient to state it thus, *Styles vs. Noakes*; and it is not necessary to state the character in which the parties sue or are sued. *Dale v. Beer, 7 East, 333.*

*General issues.*] The general issue in assumpsit, after the commencement, as above mentioned, is thus:—*says that he did not promise [or undertake or promise, according to the allegation in the declaration] in manner and form as the said plaintiff has above thereof complained against him; and of this he puts himself upon the country, &c.*

In debt on simple contract, thus:—*says that he never was indebted in manner and form as in the declaration alleged; and of this he puts himself upon the country, &c. R. Pl. 4 W. 4, II. s. 1.*

In debt on bond, &c. thus:—*says that the said writing obligatory [or indenture, or deed poll] is not his deed; and of this he puts himself upon the country, &c. And the like in covenant.*

In case or trover, thus:—*says that he is not guilty of the premises above laid to his charge, in manner and form as the said plaintiff has above thereof complained against him; and of this he puts himself upon the country, &c.*

In trespass thus:—*says that he is not guilty of the said supposed trespass above laid to his charge, or any part thereof, in manner and form as the said plaintiff has above thereof complained against him; and of this he puts himself upon the country, &c.*

In ejectment thus:—*says he is not guilty of the said supposed trespass and ejectment above laid to his charge, or any part thereof, in manner and form as the said plaintiff has above thereof complained against him; and of this he puts himself upon the country, &c.*

To a count upon a bill of exchange or promissory note, the general issue *non assumpsit* cannot be pleaded; but in such a case a plea of denial must traverse the drawing, making, accepting or indorsing, &c. *R. Pl. 4 W. 4, II. s. 1.*

In all cases where by statute a defendant may plead the general issue and give the special matter in evidence, the plea must have the words "by statute" in the margin, otherwise it shall not be deemed to be pleaded by virtue of the statute; and these words must also be inserted in the margin of the issue and nisi prius record. *R. G. T. 1 Vict.* Where the plaintiff made an affidavit, stating that he was unable to discover the statute under which the defendant intended to justify, the court ordered the defendant to point it out within three days, otherwise that the words "by statute" should be struck out. *Coy v. Ld. Forrester, 9 Dougl. 770.* Where the general issue is thus pleaded, with the words "by statute" in the margin,

the court will not allow the defendant also to plead special pleas of justification, even although some of his justifications be not within the statute, and cannot be given in evidence under the general issue; *Ross v. Clifton et al.* 11 *Ad. & El.* 631; in the latter case, all the justifications must be pleaded specially, and the words "by statute" omitted in the margin of the general issue, if pleaded.

*Sham pleas.*] Where a plea is altogether false in fact, and is pleaded for the purpose of gaining time, it is called a sham plea. The usual sham plea, formerly adopted, was a plea of judgment recovered for the same cause of action in another court; but this plea can no longer be adopted for such a purpose: for now by R. G. H. 4 W. 4, r. 1, s. 8, the defendant in the margin of such a plea must state the date of the judgment and the number of the roll (if any), otherwise the plaintiff may sign judgment as for want of a plea; or if the defendant state this, and state it falsely, then, upon the plaintiff producing a certificate from the proper officer that there is no such judgment, the court or a judge may give him leave to sign judgment. This rule, however, must not be understood as applying to a plea by an executor of judgments recovered against him. *Power v. Izod*, 1 *Bing. N. C.* 304. *S. C. nom. Power v. Fry*, 3 *Dowl.* 140.

The courts, although not inclined to sanction this system of sham pleading, feel a difficulty in interfering, by setting aside the plea, or allowing the plaintiff to treat it as a nullity and sign judgment. In the first place, the plaintiff cannot of himself treat such a plea as a nullity and sign judgment, unless the plea appear to be palpably fictitious on the face of it; *Bell v. Alexander*, 6 *M. & S.* 133. *Phillips v. Bruce*, *Id.* 134; and even if it be so, it is not at present very safe to sign judgment, without the leave of the court. And the court will not grant such leave, merely on an affidavit that the plea is false, *Idle v. Crutch*, 1 *Chit.* 524. *Smith v. Backwell*, 4 *Bing.* 512. *Edwards v. Greenwood*, 5 *Bing. N. C.* 476. and see *Young v. Gadderer*, 1 *Bing.* 380, if 'it be good upon the face of it; *Per Alderson, B., in Mitford v. Trinder*, 10 *Law J.* 473, *ex.*; nor will they compel the defendant to verify it by affidavit, *Merrington v. Beckett*, 2 *B. & C.* 81, for that would be in fact trying the merits of the cause by affidavit. Nor will they give leave to sign judgment, merely because the plea is inconsistent with an admission previously made by the defendant. *La Forest v. Langan*, 1 *Hodg.* 410. They have also refused to set aside a release by one of several co-plaintiffs to a defendant, where fraud between the releasor and the defendant was not fully established by affidavit, *Crook et al. v. Stephen*, 5 *Bing. N. C.* 688, 9 *Law J.* 209, *cp. Wild et al. v. Williams et al.* 6 *Mees. & W.* 490. But if a sham plea be palpably fic-

titious upon the face of it,—as a plea of judgment recovered in the court of piepoudre in Bartholomew fair, *Blewitt v. Marsden*, 10 East, 237, or a judgment recovered in the mayor's court in London, appearing to be at a time before the cause of action had accrued, *Phillips v. Bruce*, 6 M. & S. 134. *Lamb v. Pratt*, 1 D. & R. 577, or if it be absurd and false, *Mitford v. Trinder*, 10 Law J. 473, *ex.*,—the court will give the plaintiff leave to sign judgment. Or if a defendant plead two sham pleas, requiring different modes of trial, *Bones v. Punter*, 2 B. & A. 777. *Thomas v. Vandermoolen*, 2 B. & A. 197, or one plea comprising several defences, some of law, and others of fact, *Balmanus v. Thompson*, 8 Dowl. 76, or a plea so ingeniously framed, as to make it necessary for the plaintiff's attorney to consult counsel, and thereby cause delay and expense, *Bartley v. Godslake*, 2 B. & A. 199. *Shadwell v. Berthoud*, 5 B. & A. 750. *M'Leish v. Welsh*, 1 D. & R. 447, or a plea raising difficult questions of law, see *Charles v. Marsden*, 1 Taunt. 225, or a plea subtly drawn for the purpose of ensnaring the plaintiff, *White v. Howard*, 3 Taunt. 339, and see *Miley v. Walls*, 1 Dowl. 648. *Jones v. Studd*, 4 Bing. 663, or a plea tendering issues wholly immaterial: *Murray v. Boucher*, 9 Dowl. 537. *Knowles v. Burward*, 10 Ad. & El. 19. See *Horner v. Keppel*. *Id.* 17:—in these cases the court will in general give the plaintiff leave to sign judgment as for want of a plea, upon his producing an affidavit of the falsehood of the plea. So where the defendant pleaded a set-off to a special count in assumpsit, evidently for the purpose of securing a verdict in case he should fail upon his other pleas, the other pleas containing the real defence which, by agreement with the plaintiff, was to be set up: the court upon application set aside the plea. *Gould v. Oliver*, 4 Bing. N. C. 676.

*Plea, in what cases treated as a nullity.*] If a defendant plead a plea, which is entirely inapplicable to the action,—such as *non assumpsit* in an action of debt, *Brennan v. Egan*, 4 Taunt. 164; *nunquam indebitatus*, in an action on a bill of exchange, see *Sewell v. Dale*, 8 Dowl. 309, or the like, the plaintiff may treat the plea as a nullity, and sign judgment. And see *Hopgood v. Wright*, 2 New Rep. 188. But *nil debet* to debt on judgment, although a bad plea, is not a nullity: *Anon.* 2 Chit. 239; nor is “not guilty” in assumpsit a nullity. *Aaron v. Chaundry*, 2 B. & C. 562. If a plea be pleaded, which is not allowed by the practice of the court,—such as a plea in abatement of the writ, which cannot be pleaded without oyer of the writ, and oyer of the writ is never granted. *Murray v. Hubbard*, 1 B. & P. 645,—or if he deliver his plea at any time between the 10th August and 24th October, *Mills v. Broun*, 9 Dowl. 151,—the plaintiff may treat it as a nullity and sign judgment. So, if a defendant be under terms to plead

issuably, and he plead a plea which is not issuable, the plaintiff may treat it as a nullity, and sign judgment. *See post*, p. 280. So, if a defendant plead a special plea, not signed by counsel, *Macher v. Billing*, 1 Cr. M. & R. 577. *Shield v. Quick*, 10 Law J. 270, *ex.:* and *see post*, p. 283, or plead before appearance, *see Nolliken v. Saserne*, 2 Tyr. 304, or before declaration, *Douglas v. Green*, 2 Chit. 7, the plea may be treated as a nullity. A plea in abatement or other dilatory plea, without an affidavit to verify it, may be treated as a nullity; *post*, p. 298; but such a plea cannot be so treated, merely because the affidavit of verification was sworn before the defendant's attorney. *Horsfall v. Matthewman*, 3 M. & S. 154. Nor can a plea, which would merely be bad on demurrer, although clearly so, be treated as a nullity; *see Smith v. Jones*, 3 D. & R. 621. *Cowper v. Jones*, 4 Dowl. 591. *Allen v. Walker*, 5 Dowl. 460. *Vere v. Goldsborough*, 1 Bing. N. C. 353. *Wood v. Farr*, 5 Id. 247; and much less so, if the objectionable part may be rejected as surplusage. *Risdale v. Kelly*, 1 Dowl. 285. *Macdonnell v. Macdonnell*, 3 B. & P. 174. But if a plea be not only bad, but frivolous, the court, on application, may give the plaintiff leave to sign judgment. *See Horner v. Keppel*, 8 Law J. 204, *qb.*, *Knowles v. Burward*, Id. 206, *qb.* *Bradbury et al. v. Emans*, 9 Law J. 7 *ex.* *Balmanno et al. v. Thompson*, 9 Law J. 57 *cp.* Where, however, there was a mistake of the defendant's christian name in the commencement of the plea, it was holden that it could not be treated as a nullity, on that ground. *Anon.* 7 D. & R. 511. Nor can a plea be treated as a nullity, merely because it was delivered after nine o'clock at night, *Horsley v. Purdon*, 2 Dowl. 228, or because it was pleaded in the name of an attorney without any written authority from him, *Hill v. Mills*, 2 Dowl. 696, or in the name of the country attorney, where the appearance was in the name of the town agent. *Buckler v. Rawlins*, 3 B. & P. 111. So a plea, pleaded on a day different from that on which it bears date, is irregular only, and cannot be treated as a nullity. *Hodson v. Purnell*, 4 Mees. & W. 373.

Even in cases where the plea may be treated as a nullity, judgment cannot be signed until after the time for pleading have expired. *Nolleken v. Severn*, 1 Dowl. 320. *Dakins v. Wagner*, 3 Dowl. 535. *Smith v. Rathbone*, 5 Dowl. 401.

## 2. When to be pleaded.

*Time to plead.*] If the plaintiff declare in any other county than Middlesex or London, the defendant shall have eight days to plead. *See Holland v. Cooke*, 1 M. & S. 566. But if he declare in London or Middlesex, then if the defendant live within 20 miles of London, he shall have but four days time to plead; but if he live at a greater distance, he shall have eight days.

See *R. K. B. T.*, 5 & 6 G. 2, T. 22, G. 3; *R. C. P. M. 3 G. 2*, H. 35 G. 3, *R. Ex. M. 53 G. 3*. And in an action against an attorney, he is bound to plead in four days, whether he reside within 20 miles of London or not, *Kinder et al. v. Dunford*, 10 *Law J.* 131, *q. b.*, and whether the cause be a town cause, *Id. Mann v. Fletcher*, 5 *T. R.* 369, or a country cause, *Louder v. Lauder*, 5 *Dowl.* 684. These days are reckoned exclusive of the day on which the declaration is delivered, or notice of declaration given. And Sunday is reckoned, if it be not the last of the four or eight days. *Shoebridge v. Irwin*, 6 *Dowl.* 126. By stat. 2 W. 4, c. 39, s. 11, no plea shall be delivered between the 10th August and the 24th October; and by R. G. M. 3 W. 4, s. 12, in case the time for pleading to any declaration shall not have expired before the 10th August, the party called upon to plead shall have the same number of days for that purpose after the 24th day of October, as if the declaration had been delivered or filed on the 24th October; but in such cases it shall not be necessary to have a second rule to plead. And therefore where the time for pleading expired on the 10th August, it was holden that judgment could not be signed for want of a plea on the 11th. *Morris v. Hancock*, 11 *Law J.* 126. And the same, where a further time to plead has been obtained under a judge's order, and the enlarged time does not expire before the 10th August; *Wilson v. Bradstocke*, 2 *Dowl.* 416; and in such a case, where a month's time had been given, and 25 days of it still remained unexpired on the 10th August, it was holden that the defendant had 25 days to plead after the 24th October. *Trinder v. Smedley*, 3 *Dowl.* 87. It will be prudent, therefore, on the part of the plaintiff, when an application is made for time to plead, which will expire on or after the 10th August, or at such a time as will prevent him from proceeding to issue before the 24th October, to have it made one of the terms of granting the time that the defendant shall plead, and take all the other necessary steps in the cause, and that he himself shall be at liberty to reply and proceed to issue, &c., notwithstanding the statute and rule above mentioned.

As to the time for pleading in abatement or to the jurisdiction, see *post*.

*Imparance.*] Formerly, unless the plaintiff declared during the term in which the defendant appeared, the latter was not obliged to plead as of the same term the declaration was delivered, but was entitled to an imparance over to the next term, and might have pleaded within the first four days of that term. There were some minute variances between the practice of the different courts upon the subject, which were remedied by R. G. T. 1 W. 4, s. 7. And see *Edensor v. Hoffman*, 2 *Crompt. & J.* 140. *Thompson v. Smith*, 1 *Dowl.* 381. *Whalley v. Barnet*, *Id.* 607. *Pim v. Woodman*, *Id.* 464. But the sta-

tute 2 W. 4, c. 39, s. 11, by which it is enacted that "all necessary proceedings to judgment and execution" may be had "without delay" at the expiration of eight days from the service or execution of the process, has virtually abolished imparlances; and the defendant is now bound to plead within the time limited for that purpose by the practice of the court, whether the plaintiff declare in term or vacation. *Nurse v. Geeting*, 3 Dowl. 157. *Wigley v. Tomlins*, *Id.* 7, overruling *Frean v. Chaplin*, 2 Dowl. 523.

*Time for pleading after amendment.*] In the Queen's Bench (*R. T. 5 & 6 G. 2, b.*) and Common Pleas, (*R. E. 1 W. 4*), where the declaration is amended, the defendant shall have two days, exclusive of the day on which the amendment is actually made, to alter his plea or plead *de novo*, unless otherwise ordered by the court or judge granting leave for the amendment. And it seems that (at least in the Queen's Bench) the amendment in this case has the effect of putting an end to the plea altogether; so that the defendant must plead *de novo* to the amended declaration. *Huckvale v. Kendal*, 3 B. & A. 137. But in the Exchequer, the amendment does not necessarily put an end to the plea already pleaded; nor does it authorize the defendant to plead *de novo*, if the amendment have not rendered his plea inapplicable, unless indeed the order granting the amendment give him liberty to do so. And where, in an action in that court, the plaintiff obtained an order to amend his declaration, with liberty to the defendant to plead *de novo* or demur; and because the defendant did neither, the plaintiff signed judgment as for want of a plea: the court held that he had no right to do so, as the former pleas were good, if they applied to the amended declaration. *Fagg v. Borsley*, 2 Dowl. 107. And the practice of the Common Pleas was the same, before the making of the rule above referred to. See *Woodroffe v. Watson*, 6 Taunt. 400. By R. G. H. 2 W. 4, s. 42, "where an amendment of the declaration is allowed, no new rule to plead shall be deemed necessary, whether such amendment be made of the same term as the declaration, or of a different term." Nor is a fresh demand of plea necessary. *Huckvale v. Kendal*, 3 B. & A. 137.

*After oyer.*] After oyer granted, the defendant has the same number of days for pleading as he had at the time oyer was demanded. *Webber v. Austen*, 8 T. R. 356.

*After particulars.*] By R. G. H. 2 W. 4, s. 48, "a defendant shall be allowed the same time for pleading after the delivery of particulars under a judge's order, which he had at the return of the summons; nevertheless judgment shall not be signed till the afternoon of the day after the delivery of the particu-



lars, unless otherwise ordered by the judge." See *ante*, p. 255, and *Tate v. Bodfield*, 3 Dowl. 218.

*After respondeas ouster.*] After judgment for the plaintiff of *respondeas ouster* on a plea in abatement, the defendant is allowed four days' time to plead in bar. *Cantwell v. Earl of Stirling*, 1 Dowl. 265.

*Further time to plead.*] If the defendant wish a further time to plead than that which is allowed by the practice of the court as already mentioned, he may obtain it upon summons from a judge at chambers, upon showing the necessity for it. In extraordinary cases, the application may be made to the court, at least if the judge at chambers refuse to interfere. Where in trover for goods, it appeared that the defence was that the plaintiff had sold them, the court granted time to the defendant to plead, until after he could file a bill for a discovery, and obtain the plaintiff's answer. *Whitter v. Caselet*, 2 T. R. 683. So, in an action for an injury, brought by the mate against the captain of a South Sea whaler, and which was not commenced until within two days of the captain sailing on another voyage, a judge at chambers gave the defendant a year's time to plead; and the court, after some hesitation, refused to rescind the order, under the circumstances, it appearing that the plaintiff could not be damaged by it. *Hunt v. Barkley*, 1 Hodg. 103, 3 Dowl. 646. It may be necessary to observe that after obtaining a further time to plead, the defendant cannot move to change the venue; *Notts v. Curtis*, 1 Dowl. 319; but he may demand oyer, *Goodricke v. Turley*, 1 Gale, 354, 4 Dowl. 431, unless otherwise ordered by the judge's order for time.

If by the judge's order the defendant is given a further time to plead, that time does not begin to run, until after the time for pleading, still remaining to the defendant, has expired; *Aspnal v. Smith*, 8 Taunt. 592; but if the word "further," be omitted, the time will begin to run from the date of the order; *Lane v. Parsons*, 5 Dowl. 359. *Simpson v. Cooper*, 1 Hodg. 448. Where a month's time was applied for, and the order made, on the 5th September, the court held that it did not begin to run until after the 24th October, although one of the terms on which it was granted was, that the defendant should take short notice of trial for the first sittings in the next term. *Le Fevre v. Molineux*, 6 Dowl. 153. If it reckon from the date of the order, the time given is exclusive of that day. *Pepperell v. Burrell*, 2 Dowl. 674. Also it may be necessary to mention, that where a month's time is given, it is always deemed a lunar month, *Tullett v. Linfield*, 3 Burr. 1455. *Soper v. Curtis*, 2 Dowl. 237, unless otherwise expressed in the order.

In thus granting a further time to plead, the judge takes

care, by imposing certain terms on the defendant, that it shall not prejudice the plaintiff. The usual terms imposed are, that he shall plead issuably, rejoin *gratis*, and take short notice of trial, if necessary.

By *pleading issuably*, is meant a plea by which the right of the plaintiff to recover may be fairly put in issue. A plea of tender, *Noone v. Smith*, 1 H. Bl. 369. *Kilwich v. Maidman*, 1 Burr. 59, a plea of the statute of limitations, *Rucker v. Hannay*, 3 T. R. 124. *Maddocks v. Holmes*, 1 B. & P. 228, *overruling Stadholme v. Hodgson*, 2 T. R. 390, *no ca. sa.* against the principal, in an action against bail, *Hartley v. Hodson*, 1 Moore, 430, and in an action against a person who was surety for the payment of such sums as the plaintiff should recover against *J. S.*, a plea that a writ of error was then pending upon the judgment he obtained against *J. S.*, *Curling v. Innes*, 2 H. Bl. 372, have all been holden issuable pleas. So a plea, showing the illegality of the contract on which the plaintiff is suing, as that it is for spirits sold at different times, in quantities of less value than 20s., is an issuable plea. *Gaitskill v. Greatehead*, 1 D. & R. 359. So a plea which goes to the substance of the action, though informal and insufficient, is still deemed an issuable plea, and the plaintiff cannot sign judgment, but must demur, &c. if he would take advantage of the defect. *Thelluson v. Smith*, 5 T. R. 152. *Sealey v. Harris*, 7 Dowl. 195, 8 Law J. 149, *ex. Mackay v. Wood*, 7 Mees. & W. 420, 10 Law J. 176, *ex.* So a general demurrer, if fairly intended, is an issuable plea within the meaning of a judge's order for time to plead. *Wright v. Russell*, 2 W. Bl. 923. *Langford v. Wagborne*, 7 Price, 673. *See Gray v. Ashton*, 3 Burr. 1788. But a special demurrer is not. *Blick v. Dymoke*, 1 Bing. 379. *Sawfell v. Gillard*, 5 D. & R. 620. *Berry v. Anderson*, 7 T. R. 530. *Cuming v. Sharland*, 1 East, 411. So a plea which is entirely beside the merits of the case,—such as a plea of alien enemy, *Simeon v. Thompson*, 8 T. R. 71, or a sham plea, *Lowfield v. Jackson*, 2 Wils. 117. *Heron v. Heron*, 1 W. Bl. 376. *Cair v. Aaron*, 3 Wils. 33, or a plea in abatement, *Kilwich v. Maidman*, 1 Burr. 59, a plea of the bankruptcy or insolvency of the plaintiff, *Staples et al. v. Holdsworth*, 4 Bing. N. C. 144. *Wettenhall v. Graham*, Id. 704; *but see Willis v. Hallett*, 8 Law J. 244, *cp.*, a plea that the check, upon which the action was brought, was obtained from the defendant by a third party for a gaming debt, *Humphreys v. Earl Waldegrave*, 6 Mees. & W. 622, 9 Law J. 244, *ex.*, or the like, *see Huthwaite v. Phaire*, 9 Law J. 259, *cp.*, is not an issuable plea within the meaning of the order; nor is a plea, which is no answer to the action, and which is pleaded evidently for delay, *see French v. Watson*, 2 Wils. 74. *Searle v. Bradshaw*, 2 Cr. & M. 148. *Brown v. Austin*, 4 Dowl. 161, or is otherwise frivolous. *Blackburn v. Edwards et al.*, 10 Ad.

& *El.* 21, 8 *Law J.* 200, *qb.* If the plea be not issuable, the plaintiff may treat it as a nullity, and sign judgment. Or if the defendant plead several pleas, and any one of them be not an issuable plea, the plaintiff may treat them all as nullities, and sign judgment. *Waterfall v. Glode*, 3 *T. R.* 305. *Cuming v. Sharland*, 1 *East*, 411. *Searle v. Bradshaw*, 2 *Cr. & M.* 148. By the terms of the order, however, the defendant is not precluded from demurring, even specially, to the replication. *Betts v. Applegarth*, 4 *Ring.* 267. *Barker v. Gleadow*, 5 *Dowl.* 134, 2 *Har. & W.* 113. *Gisborne v. Wyatt*, 1 *Gale*, 35. *Woodman v. Goble*, 3 *Mees. & W.* 304. Nor is he precluded from moving to change the venue, if "pleading issuably" be the only term in the order. *Russell v. Hurst*, 1 *Cr. & M.* 184.

By *rejoining gratis* is meant, not only that the defendant shall rejoin without any rule being entered for that purpose, but also that he shall do so within twenty-four hours after a rejoinder shall have been demanded. *Clarke v. Adams*, 2 *Tyr.* 755. But this does not dispense with a demand of a rejoinder; *Seaton v. Skey*, 3 *Dowl.* 537, 1 *Har. & W.* 210; nor does it bind the defendant to join in demurrer without the usual rule. *Jones v. Key*, 2 *Cr. & M.* 340.

By *short notice of trial* is meant, four days' notice in county causes, *R. G. H.* 2 *W.* 4, s. 58. See *Pound v. Penfold*, 1 *Har. & W.* 323, and two days' notice, at least, in town causes. See post, "*Notice of trial.*" This does not oblige the defendant to take short notice of inquiry. *Blaaw v. Chalers*, 6 *Taunt.* 458. And if it be to take short notice of trial before the sheriff, it extends only to the next sitting of the sheriff after the making of the order; if the plaintiff allow that to pass, he must give the regular notice for any subsequent sitting. *Dignam v. Ibbotson*, 3 *Mees. & W.* 431.

After serving the order, the defendant cannot abandon it, but must be holden to abide by the terms of it. *Griffin v. Dickinson*, 7 *Dowl.* 860.

*Notice to plead.*] Notice to plead must be given in every case, otherwise judgment cannot be signed as for want of a plea. *Heath v. Rose*, 2 *New Rep.* 223. *Fenton v. Anstice*, 5 *Dowl.* 113, 2 *Har. & W.* 125. It is usually indorsed on the declaration, before it is delivered or filed; but it may be given on a separate paper. *West v. Radford*, 3 *Burr.* 1352. *Anon.* 2 *Wils.* 137. See the *Form*, ante, p. 291. The time mentioned in it should correspond with the time for pleading, mentioned ante, p. 275; but if it state a longer time than the defendant is entitled to, the defendant has a right to avail himself of it, and the plaintiff cannot sign judgment before that time has expired; *Solomonson v. Parker*, 2 *Dowl.* 405; if a less time, judgment cannot be signed before the real time has expired.

Where the declaration was indorsed "to plead in —," the court held it to be sufficient, and that it must be understood to mean within the number of days allowed by the practice of the court. *Hifferman v. Langelle*, 2 B. & P. 363.

*Rule to plead.*] A rule to plead also must be entered, unless the defendant be bound by a rule of court or judge's order to plead within a limited time, *Nias v. Spratley*, 4 B. & C. 386. *Cardozo v. Hardy*, 2 Moore, 220, or have obtained time to plead before any rule to plead given. *Starkie v. Wilks*, 1 Crompt. Pr. 66, and see 1 H. Bl. 87. *Donne v. Marsh*, 7 Taunt. 587. But by merely taking out a summons for further time to plead, and which he does not afterwards attend, he does not waive his right to a rule to plead; *Decker v. Shedden*, 3 B. & P. 180, but see *Nugee v. M'Donell*, 3 Dowl. 579 cont.; nor does he waive his right to it, by pleading without it, where his plea for some defect is treated as a nullity. *Warne v. Beresford*, 4 Dowl. 361.

The rule is entered with the officer who acts as clerk of the rules of the court; it is entered merely, and not served. Care must be taken to enter it by the correct name of the cause, otherwise it may be treated as a nullity. *Warne v. Beresford*, 4 Dowl. 361. It may be entered on any part of the day the declaration is delivered, or filed and notice given, *Atman v. Conway*, 3 Mees. & W. 71. *Chapman v. Davis*, 1 M. & Gr. 388, overruling *Bennett v. Smith*, 3 Bing. N. C. 307; but see *Pope v. Mann*, 2 Mees. & W. 881, or afterwards; but not before it. *Perry v. Fisher*, 6 East, 549. It is a four day rule; and the defendant must plead within the four days, (if his time for pleading be then out, and a plea be demanded, when necessary), and this even although the rule expire on a *dies non*; *Mesure v. Britten*, 2 H. Bl. 616. *Wilkinson v. Britton*, 1 M. & Gr. 557; otherwise the plaintiff may sign judgment as for want of a plea.

Formerly, if judgment were not signed of the term in which the rule to plead was given, a new rule to plead must have been given of the term in which the judgment was signed. But this is no longer necessary, whether the rule have been given in the preceding vacation, *Mould v. Murphy*, 1 Cr. & M. 495, or in a previous term. *Pryer v. Smith*, 1 Cr. & M. 855. *Usborne v. Pennell*, 1 Bing. N. C. 320. So, where the time for pleading does not expire before the 10th August, so that the defendant has his full time to plead after the 24th October, as already mentioned, *ante*, p. 276, it is not necessary in that case to give a second rule to plead. *R. G. M.* 3 W. 4, s. 12. Nor is it necessary to give a new rule to plead, after amending the declaration. *R. G. H.* 2 W. 4, s. 42, *ante*, p. 277.

*Demand of plea.*] A demand of plea must be given, before the defendant is compellable to plead, and before the plaintiff

can sign judgment as for want of a plea. And this, even although the defendant has not taken the declaration out of the office; *White v. Dent*, 1 B. & P. 341; or although the defendant be a prisoner in the custody of the marshal. *Rose v. Christfield*, 1 T. R. 591, *per Buller, J.* But a demand of plea is not necessary, where the defendant is in the custody of the sheriff, and declared against as such, *per Buller, J.* 1 T. R. 591, *Wilkinson v. Brown*, 6 T. R. 524. *Remington v. Johnson*, 2 B. & C. 803, or where he removes himself into a different custody, without giving notice thereof to the plaintiff, *Wilkinson v. Brown, supra*, although prudent now, perhaps, to give it; nor is it necessary where the plaintiff enters an appearance for the defendant, in pursuance of the statute; *Palk v. Rendle*, 8 T. R. 465. *North v. Lambert*, 2 B. & P. 218. *Jones v. Wilkinson*, Barnes, 177. *Shadwell v. Angel*, 1 Burr. 55. *Free v. Mason*, 5 B. & C. 763. *Davis v. Cooper*, 2 Dougl. 135; or where the defendant obtains time to plead by a judge's order or rule of court; *Pearson v. Reynolds*, 4 East, 571. *Baker v. Hall*, 1 Taunt. 538; or after the declaration has been amended. *Huckvale v. Kendal*, 3 B. & A. 137. Also a defendant dispenses with a demand of plea, by pleading without it; and if his plea turn out to be a nullity, the plaintiff may sign judgment without demanding a plea. *Brandon v. Payne*, 1 T. R. 689. *Bond v. Smart*, 1 Chit. 735. *Anon.* 2 Smith, 393; *but see Hough v. Bond*, 1 Mees. & W. 314, *cont.*

Formerly, by demanding a plea in a bailable action, the plaintiff waived his right to bail, *Law v. Stevens*, 1 Dougl. 425, or to justification, if bail had been put in; *MS. B.* 1174, 1175; except under particular circumstances. *See R. v. Sh. of London*, 1 D. & R. 163. *R. v. Sh. of Middlesex*, 4 D. & R. 835. But that, it should seem, is no longer so, as the arrest is now a collateral proceeding, and has no necessary connection with the action. In nonbailable actions, a demand of plea before the defendant has appeared, is a mere nullity. *Cook v. Raven*, 1 T. R. 635.

The demand must be in writing, *Nott v. Oldfield*, 1 Wils. 134. *R. M.* 1 G. 2, C. P., and may be in this form: "*The plaintiff demands a plea in this cause.*" It "may be made at the time when the declaration is delivered, and may be indorsed thereon," *R. G. H.* 2 W. 4, s. 43, and which is now the usual practice; or it may be given on a separate paper, in which case it must be intituled in the court and cause, and signed and directed as ordinary notices in the cause. It may be given, however, before the rule to plead. *Maxwell v. Sherrett*, 2 Smith, 159. If once given, it is not necessary in any case to make a demand a second time. *Sweet v. John*, 1 Chit. 735. *Anon.* *MS. B.* 1178.

*Judgment for want of a plea.*] As to the manner of signing judgment, *see post*, p. 305. Formerly it could not have been

signed until after 24 hours from the time the demand of plea was made. But now, by R. G. H. 2 W. 4, s. 66, "judgment for want of a plea, after demand, may in all cases be signed at the opening of the office in the afternoon of the day after that on which the demand was made, but not before." This of course supposes the time for pleading to be then out, and the rule to plead expired; for until then, judgment for want of a plea cannot be signed at all. If, therefore, the demand of plea have been made more than 24 hours before the time for pleading expire, the above rule does not apply; but judgment in that case may be signed on the day after the time for pleading and the rule to plead have expired,—in the Exchequer at the opening of the office in the forenoon; *Blundell v. Hansom*, 5 Dowl. 457, *overruling Kemp v. Fyson*, 3 Dowl. 265; the same practice in the Common Pleas; *R. H. 1 Vict.* C. P.; and in the Queen's Bench, at the opening of the office in the forenoon, in all cases except where notice is given to plead within the first four days of term, and then at the opening of the office in the afternoon. *Duncan v. Carleton*, 2 B. & C. 798, 799. It cannot, however, be signed after plea pleaded; *Leigh v. Bender*, 4 Dowl. 201, 1 Gale, 269; nor can it be signed on a dies non. *Harrison v. Smith*, 9 B. & C. 243; but see *Bennett v. Potter*, 2 Crompt. & J. 632, *cont.* Nor can it in any case be signed until the time for pleading be out, even although the defendant may have pleaded a plea which is a nullity. *Macher v. Billing*, 3 Dowl. 246. *Nolleken v. Severne*, 2 Tyr. 304. *Pepperell v. Burrell*, 1 Cr. M. & R. 372. In what cases, and on what terms the court will set aside the judgment, see *post*, p. 306.

### 3. How pleaded.

In order to plead, the first thing to be done is to get the declaration (if filed) out of the office; for if the defendant plead before he takes the declaration out of the office, the plaintiff may treat his plea as a nullity and sign judgment, without even demanding a plea. *Bond v. Smart*, 1 Chit. 735, and see *White v. Dent*, 1 B. & P. 341. *Keeling v. Newton*, 1 Wils. 173. Then prepare the pleas, and if any of them conclude with a verification, get the draft signed by counsel, otherwise the plaintiff may treat them as a nullity, and sign judgment, *R. E. 18 C. 2 K. B. Samuels v. Dunne*, 3 Taunt. 386, *Macher v. Billing*, 1 Cr. M. & R. 577, and upon the whole declaration, even although other pleas be pleaded with it, which do not require such signature. *Shield v. Twigg*, 9 Dowl. 751. *S. C. nom. Shield v. Quick*, 10 Law J. 270, *ex.* It seems, however, that the plea of *plene administravit* in the Queen's Bench and Exchequer, *Read v. Speer*, 5 Dowl. 330. *S. C. Reed v. Spurr*, 2 Mees. & W. 76, and the plea of *nul tiel record* in the Common Pleas, *Hubert v. Ld. Weymouth*, 2 W. Bl. 816, do

not require to be signed; and by R. G. H. 2 W. 4, s. 107, "it shall not be necessary that any pleadings which conclude to the country be signed by counsel."

The plea is now in all cases to be delivered, not filed. R. G. H. 4 W. 4, r. 1, s. 1. And it cannot be delivered at any time between the 10th August and the 24th October; 1 & 2 W. 4, c. 39, s. 11; otherwise it may be treated as a nullity. See *Mills v. Brown*, 9 Dougl. 151. It should be delivered also before 9 o'clock at night; R. G. H. 2 W. 4, s. 50; but where it was delivered after that hour, and the plaintiff's attorney kept it several days, without objecting to it on that account, and then signed judgment as for want of a plea, the court held that the plaintiff was not warranted in treating the plea as a nullity. *Horsley v. Purdon*, 2 Dougl. 228. Care must be taken that an appearance has been entered, before the plea is delivered. See *Nolleken v. Severne*, 2 Tyr. 374, ante p. 275. *Venn v. Calvert*, 4 T. R. 578.

*Double pleas.*] As to what pleas a defendant will be allowed to plead, see *Arch. Pl. & Ev.* 234—239. Care must be taken that "a distinct ground of answer or defence is intended to be established in respect of each;" R. Pl. H. 2 W. 4, r. 2; otherwise upon application to a judge at chambers, they will be ordered to be struck out, *Id.* ss. 5, 6, in the same manner as where counts are improperly joined in a declaration. See ante, p. 223. And where the general issue "by statute" is pleaded, the court will not allow the defendant to plead any special pleas with it, *Legge v. Boyd*, 9 Dougl. 39, even although the special pleas contain a matter of defence which could not be given in evidence under the general issue. *Ross v. Clifton et al.*, 11 Ad. & El. 631.

A rule must first be obtained to enable a defendant to plead two or more pleas; for by R. G. H. 2 W. 4, s. 34, "if a party plead several pleas, avowries, or cognizances, without a rule for that purpose, the opposite party shall be at liberty to sign judgment." See *Hockley v. Sutton*, 2 Dougl. 700. This means only where two or more pleas are pleaded to the same part of the declaration; for if one plea be pleaded to one part, and another to another, it requires no rule. *Archer v. Garrard*, 3 Mees. & W. 63. The manner of obtaining it is described by R. G. T. 1 W. 4, s. 13, thus: "No rule to show cause or motion shall be required, in order to obtain a rule to plead several matters, or to make several avowries or cognizances; but such rules shall be drawn up upon a judge's order, to be made upon a summons, accompanied by a short abstract or statement of the intended pleas, avowries, or cognizances: provided that no summons or order shall be necessary in the following cases, that is to say,—when the plea of *non assumpsit*, or *nil debet*, or *non detinet*, with or without a plea of tender as to part, a plea of the statute of limitations, set-off, bankruptcy of the

defendant, discharge under an insolvent act, *plene administravit*, *plene administravit præter*, infancy and coverture, or any two or more of such pleas, shall be pleaded together; but in all such cases a rule shall be drawn up by the proper officer, upon the production of the engrossment of the pleas, or a draft or copy thereof." Where the plaintiff signed judgment as for want of a plea, because the rule was intituled in a cause of A. v. B., instead of A. v. B. and others, the court set aside the judgment, but without costs. *Christie v. Walker*, 1 Bing. 187.

If there be any objection that one or more of the pleas pleaded should not be allowed, the plaintiff should apply to the court to discharge the judge's order above mentioned, see *Howen v. Carr*, 5 Dowl. 305, but not to strike out the objectionable plea; *South Eastern Railway Company v. Sprot*, 11 Ad. & El. 167, but see *Alwen v. Furrival*, 1 Dowl. 690. *Cotton v. Brown*, 1 Har. & W. 419; the court, however, will not interfere, where the plaintiff himself has consented to the rule, *Howen v. Carr*, *supra*, or where the question of its admissibility appears to be one of doubt or nicety. *Trickey v. Yeandall*, 1 Bing. 66. Where a defendant pleaded the general issue and a special plea to the whole declaration, and he had judgment on demurrer to the special plea, the court upon his application struck out the general issue, intimating, however, that the application might have been made to a judge at chambers. *Young v. Beck*, 3 Dowl. 804. The court have also in some cases, where a release by one of several plaintiffs has been pleaded, interfered and set aside the plea, particularly where the plaintiffs were merely trustees, see *Johnson et al. v. Holdsworth*, 4 Dowl. 63. *Jones et al. v. Herbert*, 7 Taunt. 421, or the plaintiff who released was merely joined for conformity, *Innel v. Newman*, 4 B. & A. 419, a strong case being made out to induce them to do so, and the party who released being indemnified against costs. They will not, however, prevent a defendant from pleading one of several pleas, merely because it is bad in law. *Bulley v. Foulkes et al.*, 9 Law J. 185, *ex.*

#### 4. *Withdrawing, or adding pleas.*

The defendant must now, in all cases, abide by his plea, unless he get leave from the court or a judge to withdraw it; for by R. G. H. 2 W. 4, s. 46, "the defendant shall not be at liberty to waive his plea, without leave of the court or a judge." As to withdrawing the pleas altogether, and not pleading *de novo*, that we shall consider when we come to treat of a retraxit. But the court will in general allow a defendant to withdraw his pleas and plead *de novo*, if they be satisfied that the justice of the case requires they should grant such an indulgence; *Fres v. Hawkins*, 7 Taunt. 278. *Wilks v. Wood*, 2 Wils. 204. *Elworthy v. Cowell*, 6 Moore, 495. *Olding v.*



*Arundle*, 1 *W. Bl.* 357. *Taylor v. Joddrell*, 1 *Wils.* 254. *Pap-lief v. Codrington*, 4 *Dowl.* 497. *Atkinson v. Duckham*, *Id.* 327. *Price v. Severn*, 7 *Bing.* 402. *Chambers v. Bernasconi*, 1 *Crompt. & J.* 459; but the application should be made promptly. See *Freeman v. Jones*, 2 *Wils.* 391. The court will in like manner and under the same circumstances allow a defendant to add a plea to those already pleaded, *Smith v. Dixon*, 1 *Har. & W.* 668. See *Cox v. Holt*, 2 *Wils.* 253. *Jenkins v. Creech*, 5 *Dowl.* 293, if the application be made within a reasonable time, *Kirby v. Simpson*, 3 *Dowl.* 791. See *Waters v. Bovell*, 1 *Wils.* 223, and the justice of the case require it. *M'Dowall v. Lyster*, 2 *Mees. & W.* 52. But the defendant cannot, of himself and without leave, after pleading one plea, afterwards plead another; and where he first pleaded in abatement, and afterwards a sham plea in bar, *Palmer v. Dixon*, 5 *D. & R.* 623, also where he pleaded twice on the same day, for the purpose of misleading the plaintiff by his second plea, *Samuels v. Dunne*, 3 *Taunt.* 386, the court held that the plaintiff was warranted in signing judgment as for want of a plea.

## SECTION VII.

## Plea of set-off.

Mutual debts may be set off, one against the other, 2 *G. 2. c. 22, s. 13*, although they may be of a different nature; 8 *G. 2. c. 24, s. 5*; and the plaintiff shall recover the balance only. *Id.* The debt to be set off must be due, not only at the time the plea is pleaded, but also at the time of the commencement of the action. *Braithwaite v. Coleman*, 4 *Nev. & M.* 654. *Evans v. Prosser*, 3 *T. R.* 186. And it must be a debt, in the legal acceptance of the term, and not merely a claim sounding in damages. And therefore in an action by a servant against his master for wages, the latter cannot set off the value of goods lost by the servant's negligence. See *Le Loir v. Bristow*, 4 *Camp.* 134. And see *Freeman v. Hegett*, 1 *W. Bl.* 394. So, unliquidated damages arising from the breach of a covenant cannot be set off; *Howlett v. Strickland*, *Coup.* 56. *Grant v. Royal, Exch. Ins. Co.* 5 *M. & S.* 439. *Weigal v. Waters*, 6 *T. R.* 488; or a sum due from a third person to the defendant, for which the latter has the plaintiff's guarantee; *Morley v. Inglis et al.* 4 *Bing. N. C.* 58; and see *Abbott et al. v. Hicks*, 5 *Id.* 579; but a sum certain due upon a covenant, such as rent, or the like, may. There cannot, however, be a set-off in replevin, even to an avowry for rent, *Laycock v. Tuffnell*, 2 *Chit.* 531. *Sap-ford v. Fletcher*, 5 *T. R.* 512, nor in any action *ex delicto*, for the statutes of set-off do not extend to them. So in an action for not providing for bills which the plaintiff had accepted for the defendant's accommodation, whereby, &c. the

court held that as the plaintiff might be entitled upon this declaration to recover special damage, a set-off was not a good plea. *Hardcastle v. Netherwood*, 5 B. & A. 93. A set-off may be pleaded in debt on bond, conditioned for the payment of money, but the defendant must show by his plea what is really due on the bond. *Symmonds v. Knox*, 3 T.R. 65. So a set-off may be pleaded in debt on bond conditioned for payment of an annuity or the like; *Collins v. Collins*, 2 Burr. 820; but not in debt on bond conditioned to replace stock. *Gillingham v. Waskett, M'Clet*. 198. As to setting off a penalty, see 8 G. 2, c. 24, s. 5. *Nedriffe v. Hogan*, 2 Burr. 1024. *Fletcher v. Dyche*, 2 T. R. 32.

The debts must be mutual, and due in the same right. A debt due by two partners cannot be set off in an action by one of them in his own right; or a debt due by one of two partners, in an action by both; *France et al. v. White et al.*, 9 Law J. 27, *cp.*; but otherwise, where the other is a dormant partner, *Stacy v. Decy*, 7 T.R. 361, *n.*, or where the debt is due from or to a surviving partner. *Slipper v. Stidstone*, 5 T. R. 493. *French v. Andrade*, 6 T. R. 582. In an action by an executor or administrator, if the cause of action accrued since the death of the testator or intestate, the defendant cannot set off a debt due to him from the deceased; *Shipman v. Thompson, Willes*, 103. *Warn v. Bickford*, 7 Price, 550. *Kilvington v. Stevenson*, 1 Selw. N.P. 145; but if the cause of action took place before the death, he may. 2 G. 2, c. 22, s. 13. In an action brought by a trustee, the defendant cannot set off a debt due to him from the cestui que trust. *Tucker v. Tucker*, 1 Nev. & M. 477. So the assignee of a bond debt cannot set it off in an action against him by the obligor. *Wake v. Tinkler*, 16 East, 36. In an action on a bond, the defendant cannot set off a debt due to him in right of his wife; *Paynter v. Walker, Bull*, N. P. 179; nor can a debt due from a wife *dum sola* be set off in an action brought by the husband alone. *Wood v. Akers*, 2 Esp. 594. In an action by a certificated bankrupt, for goods sold by him since his bankruptcy, the defendant cannot set off a debt due to him from the plaintiff before his bankruptcy, although the cause of action accrued before the certificate: for the old debt was barred by the certificate. *Hayllar v. Sherwood*, 2 Nev. & M. 401.

The statute must now be pleaded in all cases: since the New Rules of pleading, you cannot plead the general issue and give notice of set-off. *Graham v. Partridge*, 5 Dowl. 108. And see *Duncan v. Grant*, 2 Dowl. 683. Where an action was brought to try a right, and the defendant, besides traversing the right, pleaded also a set-off, for the purpose of securing a verdict, the court set aside the particulars of set-off, on the plaintiff paying the defendant the amount claimed by them. *Gould v. Oliver*, 4 Bing. N. C. 676.

This plea is pleaded in the same manner as any other plea in bar. As it is in the nature of a declaration, if the jury find the issue joined upon it against the defendant, the verdict will be a bar to any subsequent action by the defendant for the same claim. *Eastmure v. Laws*, 5 Bing. N. C. 444.

*Particulars of set-off.*] Where a defendant pleads a set-off, a judge at chambers, upon the application of the plaintiff, will order him to deliver a particular of his set-off, in the same cases in which he would be ordered to deliver particulars of his demand, if he had brought an action to recover the amount. See *ante*, p. 253. But in no other instance of a plea, not even in the case of a plea of payment, *Phipps v. Sothorn*, 8 Dougl. 208 S. C. nom. *Phipps v. Lothian*, 9 Law J. 88, *ex.*, will such a particular be ordered. If the defendant deliver a particular of his set-off, the plaintiff, we have seen, (*ante*, p. 252) must annex a copy of them to the record at the time he enters it with the judge's marshal.

## SECTION VIII.

*Plea of tender.*

*In what cases.*] Where a claim is made upon a party for a debt or sum certain, he may tender such sum as he considers to be due, at any time before an action is commenced against him for it; 1 *Saund.* 33, note 2; and he may then plead the tender in bar of the action. In covenant for rent, a plea of tender has been holden to be a good plea. *Johnson v. Clay*, 7 *Taunt.* 486. And it has been holden to be a good plea to a *quantum meruit*, although the demand is uncertain. *Johnson v. Lancaster*, 1 *Str.* 576. But it cannot be pleaded in an action for unliquidated damages, such as an action for not repairing, *Searle v. Barrett*, 4 *Nev. & M.* 200, or the like. In debt on a money bond, a tender of the principal and interest after the day of payment, *Underhill v. Matthews*, *Bull.* N. P. 171, or in an action on a bill of exchange, a tender after the day of payment, *Hume v. Peploe*, 8 *East*, 168. *Poole v. Turnbridge*, 2 *Mees. & W.* 223, cannot be pleaded.

*By and to whom.*] The tender may be made by the party himself, or by any person authorized by him to make it; *Read v. Goldring*, 2 *M. & S.* 86; and it may be made to the claimant, or to any person authorized by him to receive it. *Goodland v. Blewith*, 1 *Camp.* 477. *Moffatt v. Parsons*, 5 *Taunt.* 307. If an attorney be authorized to demand payment of a debt, and he accordingly write to the debtor, requiring the money to be paid to him or to his client, if the

money be tendered to the attorney, it will be a good tender; but otherwise, if it be tendered merely to the attorney's clerk, *Bingham v. Allport*, 1 Nev. & M. 398, unless the attorney, by his letter, require it to be paid, not merely to him, but at his office, or the like. *Kirton v. Braithwaite*, 1 Mees. & W. 310. A tender to one of several partners is good as a tender to all. *Douglas v. Partrick*, 3 T. R. 683.

*How.*] A tender in silver coin is good only for sums not exceeding 40s. 56 G. 3, c. 68, s. 12. A tender in bank of England notes for all sums exceeding 5l. is a good tender, 3 & 4 W. 4, c. 98, s. 6. The notes of a private banker, however, is not a strictly legal tender; *Grigby v. Oakes*, 2 B. & P. 526. *Mills v. Safford*, *Peake*, 180, n.; but if the party do not object to it on that ground, it will be sufficient. *Brown v. Saul*, 4 Esp. 267. *Wright v. Read*, 5 T. R. 554. *Lockyer v. Jones*, *Peake*, 180, n. An offer of a greater sum to pay a smaller, and requiring change, is not a good tender; *Robinson v. Cooke*, 6 Taunt. 336. *Betterbee v. Davis*, 3 Camp. 70. *Blow v. Russell*, 1 Car. & P. 365. *Brady v. Jones*, 2 D. & R. 305; but if the creditor in such a case only object to the smaller sum, as not being sufficient, and not to the manner in which it is tendered, it will be deemed a good tender. *Cadman v. Lubbock*, 5 D. & R. 289. *Saunders v. Graham*, 1 Gow. 111. So, where a creditor refused to tell his debtor what amount he owed him, and the debtor then put down 150 sovereigns, telling the creditor to take the sum due, this was holden a good tender. *Bevan v. Rees et al.* 7 Dowl. 510. So, to make a good tender, the money should be produced, and offered to the party; see *Finch v. Brook*, 1 Bing. N. C. 253. *Thomas v. Evans*, 10 East, 101; but if the debtor have it ready to produce, and offer to pay it, but the creditor refuse to receive it, claiming a larger sum to be due to him, that or the like will dispense with the production of the money. *Black v. Smith*, *Peake*, 88. See *Kraus v. Arnold*, 7 Moore, 59.

The tender must not be clogged with any condition, such as an offer by the debtor to pay the money, if the creditor will give him a receipt in full, *Griffith v. Hodges*, 1 Car. & P. 419, or will take it in full of his demand, *Cheminant v. Thornton*, 2 Car. & P. 50. *Evans v. Judkins*, 4 Camp. 156. *Peacock v. Dickerson*, 2 Car. & P. 51, n., and see *Eckstein v. Reynolds*, 7 Ad. & El. 80, or give him a stamped receipt, *Laing v. Meader*, 1 Car. & P. 257, and see *Ryder v. Ld. Townsend*, 7 D. & R. 119, or the like; if so, it will be bad.

The tender may be avoided by the creditor, or some person authorized by him (see *Coles v. Bell*, 1 Camp. 478, n.) afterwards demanding from the defendant the exact sum tendered, *Rivers v. Griffiths*, 5 B. & A. 630. *Spibey v. Hyde*, 1 Camp. 181, and the defendant refusing or neglecting to pay it.

*How pleaded.*] Get your plea drawn and signed by counsel. Take it to the master's office, and pay the amount of the sum tendered into court; the clerk there will give you a receipt for it in the margin of the plea. Then deliver your plea in the ordinary way. A plea of tender as to part of the plaintiff's demand, without paying the money into court, can only be deemed a nullity as to so much, but will not entitle the plaintiff to sign judgment by default as to the whole. *Chapman v. Hicks*, 2 Dowl. 641, and see *Bulwer v. Horne*, 1 Nev. & M. 117. Money deposited in lieu of bail will not be allowed to be converted into a payment into court under a plea of tender. *Stultz v. Heneage*, 10 Bing. 561, 2 Dowl. 806, ante, p. 199, 200.

## SECTION IX.

*Plea of payment of money into court.*1. *In ordinary cases.*

*In what actions.*] By stat. 3 & 4 W. 4, c. 42, s. 21, "it shall be lawful for the defendant, in all personal actions (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching of the plaintiff's daughter or servant), by leave of any of the superior courts where such action is pending, or a judge of any of the said superior courts, to pay into court a sum of money, by way of compensation or amends, in such manner and under such regulations as to the payment of costs and the form of pleading, as the judges of the said courts or eight or more of them shall, by any rules or orders by them to be from time to time made, order and direct." It cannot, however, be pleaded in debt on a bill of exchange or promissory note, without being specially demurrable; for the defendant in such an action is not allowed by the new rules to plead *numquam indebitatus* as to the residue. See *Finleyson v. Mackenzie*, 3 Bing. N. C. 824. *Armfield v. Burgin et al.*, 8 Dowl. 247.

It is right to observe, that payment of money into court, has in general the effect of admitting the cause of action stated in the declaration or count, in respect of which it is paid in, see *Lloyd v. Walkey*, 9 Car. & P. 771. *Hingham v. Roberts*, 7 Dowl. 352. *Stoveld v. Brewin et al.*, 2 B. & A. 116. *Kingham v. Roberts*, 8 Law J., 189, ex., and that the action is brought against the proper parties, *Ravenscroft v. Wise et al.*, 1 Cr. M. & R. 203, to the extent of the sum paid in. *Stapleton v. Nowell*, 6 Mees. & W. 9. But it is deemed to be an admission of it, only to the extent of the money paid in; and it does not preclude the defendant from pleading or setting up

any defence he may think fit, to the residue of the cause of action. *Reid v. Dickons*, 5 B. & Ad. 499. *Booth v. Howard*, 5 Dowl. 438. *Lechmere v. Fletcher*, 1 Cr. & M. 623. As this however is a question of evidence, and not of practice, we shall not treat further of it here, but refer the reader to the text books on evidence, where he will find the matter particularly treated.

*When and how paid in.*] As the payment of money into court must be pleaded, it must of course be paid into court before plea pleaded. As the court however have the power of allowing the defendant to amend his pleas, by adding a new one, they may, if they think fit, allow him to pay money into court at any time before trial. They have done so, even after granting a new trial, *Anon.* 1 Tidd. 672, and after setting aside the execution of a writ of inquiry. *Day v. Edwards*, 1 Taunt. 491.

By R. G. H. 2 W. 4, s. 55, "in all cases in which money may be paid into court, leave to pay it in may be obtained by a side bar rule." But by R. G. H. 4 W. 4, r. 2, s. 18, "no rule or judge's order to pay money into court shall be necessary, except under the 3 & 4 W. 4, c. 42, s. 21, but the money shall be paid to the proper officer of each court, who shall give a receipt for the amount in the margin of the plea, and the said sum shall be paid out to the plaintiff on demand."

The money must now be paid in at the masters' office, and by the masters will be paid into the bank of England, to the credit of the suitors' fund. See 1 Vict. c. 30, s. 9. The money is afterwards paid to the party entitled to it, by checks on the bank of England, signed by two or more of the masters. The money may be paid in, either on the whole declaration, or on any particular count.

*Plea, &c.*] By R. G. T. 1 Vict., "where money is paid into court, such payment shall be pleaded in all cases, and as near as may be in the following form, *mutatis mutandis*."

*The day of*

C. D. } *The defendant, by his attorney [or in person,*  
*ats. &c.] says [or, in case it be pleaded to part only, add*  
 A. B. } *"as to £ , being part of the sum in the declaration,"*  
 or *"as to the residue of the sum of £ " ] that the plaintiff*  
*ought not further to maintain his action; because the defendant*  
*now brings into court the sum of £ , ready to be paid to*  
*the plaintiff. And the defendant further says, that the plaintiff*  
*has not sustained damages [or in actions of debt, that he never*  
*was indebted to the plaintiff] to a greater amount than the said*  
*sum, &c., in respect of the cause of action in the declaration [or*  
*in the introductory part of this plea] mentioned; and this he is*

ready to verify: wherefore he prays judgment, if the plaintiff ought further to maintain his action thereof. See *Sharn v. Stevenson*, 3 Dowl. 709. *Coates v. Stevens*, Id. 784. *Alcock v. Booth*, 1 Bing. N. C. 693.

By R. G. T. 1 Vict., the plaintiff, after delivery of a plea of payment of money into court, shall be at liberty to reply the same, by accepting the sum so paid into court in full satisfaction and discharge of the cause of action in respect of which it has been paid in; and he shall be at liberty in that case to tax his costs of suit, and in case of non-payment thereof within forty-eight hours, to sign judgment for his costs of suit to be taxed: or the plaintiff may reply, "that he has sustained damages" [or "that the defendant is indebted to him," as the case may be] "to a greater amount than the said sum;" and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit.

However, whether the plaintiff proceed to trial or not, the money paid into court in any event belongs to him; and he is entitled to it, although he recover a smaller sum, *Elliott v. Callow*, 2 Salk. 597. *Anon. Barnes*, 199, or even although the plaintiff be nonsuit, *Lane v. Wilkinson*, M. S. B. 2761, or although the defendant die before the suit is terminated; *Knapton v. Dring*, Pr. Reg. 251; or if the plaintiff die, his executor, &c. will be entitled to it. *Crochay v. Martin, Barnes*, 199. In no case whatever can the defendant have it back. *Per Buller, J. in Malcolm v. Fullarton*, 2 T. R. 648. By taking the money out of court, the plaintiff waives all objection to the regularity of the rule for paying it in. *Griffith v. Williams*, 1 T. R. 710.

*Costs.*] If the plaintiff, instead of proceeding in the action, reply that he accepts the sum paid in in full satisfaction, he will be entitled to his costs up to that time; *R. G. T. 1 Vict. supra*; and it was so formerly in all the courts. Even where the sum paid in was under 40s. the court held that as the replication in satisfaction put an end to the suit, the defendant could not be allowed afterwards to enter a suggestion on the roll, for costs under a court of requests Act. *Ferrant v. Morgan*, 1 Gale, 156. Where the plea of payment into court is not the only plea, and there are other issues on the record at the time the plaintiff accepts the sum paid in, see as to the costs of the other issues in such a case, *Goode v. Goldsmith*, 5 Dowl. 288. *Coates v. Stevens*, 3 Dowl. 784. *Emmett v. Standen*, 6 Dowl. 591. *Fischer v. Aide*, Id. 594. *Twemlow et al. v. Askey et al.*, Id. 597. *Benn v. Bateman*, 9 Id. 743. Where the plaintiff had replied damages *ultra*, but in showing cause against a rule for judgment as in case of a nonsuit, he expressed a desire to be allowed to take the money out

the court allowed him to do so, upon his amending replication, and paying the defendant his costs incurred by the payment of the money into court. *Kelly v. Flint*, 2 Dowl. 293.

If a defendant offer to pay a sum of money in satisfaction of the action, and the plaintiff refuse it, and the defendant afterwards pay the same or a less sum into court: if the plaintiff take the money out of court, and proceed to tax his costs, the court in general will allow the plaintiff his costs up to the time of the offer only, and not to the time of paying the money into court, but will make him pay to the defendant the costs incurred by the offer since the offer. *Hale v. Baker*, 2 Dowl. 125. *Marryott v. Pope*, 1 Dowl. 701. *James v. Raggett*, 2 B. & A. 776. *Parsons v. Pitcher*, 4 Bing. N. C. 306. *Sawbridge v. Coxwell*, 4 Taunt. 255. *Golding v. Grace*, 2 W. Bl. 740. *Zewin v. Cowell*, 4 Taunt. 203; and see *Roe v. Cobham*, 6 Dowl. 628. The court do this upon the presumption that the plaintiff refused the sum offered, merely for the purpose of making costs. But when this presumption can be fairly rebutted, when the plaintiff can satisfactorily explain the reason of his refusal of the money offered, and of his afterwards taking the same or a less sum out of court, so as to satisfy the court that it did not proceed from a wish to create costs, the court will allow the plaintiff his costs up to the time of paying the money into court. *Ackroyd v. Read*, 5 Mees. & W. 542.

If on the other hand the plaintiff reply damages *ultra*, and give a verdict, he shall have his costs, as in ordinary cases. But if the defendant have a verdict, he shall be entitled to judgment and his costs generally, *R. G. T. 1 Vict.*, ante, p. 292, as was formerly the case in the court of King's Bench, *Stevenson v. York*, 4 T. R. 10, and not merely to his costs incurred since the payment of the money into court, as was formerly the practice in the courts of Common Pleas and Exchequer. *Wilton v. Place*, 2 B. & P. 56. *Edwards v. Harrison*, 11 Price, 533, but see *Jeffs v. Smith*, 4 Taunt. 196. And the same, when the plaintiff is nonsuit, *Rabell v. Hudson*, 4 T. R. 10, or a juror withdrawn, *Stodhart v. Johnson*, 3 T. R. 657, or where the plaintiff discontinues the action, after proceeding in it, *Berwick v. Symonde*, Say. 196, or there is judgment against him as in case of a nonsuit, *Crosby v. Olorenshaw*, 2 M. & S. 335, or judgment of *non pros*. *Postle v. Beckington*, 1 Marsh. 510.

By R. G. H. 2 W. 4, s. 104, "where money is paid into court in several actions which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one, and fails, he shall be entitled to costs on the others, up to the time of paying money into court."



2. *In other cases.*

*By defendant upon a tender.*] The defendant must pay money into court upon a plea of tender, otherwise his plea may be treated as a nullity. 1 *Str.* 638. And the plaintiff in that case may take the money out of court, though he impeach the tender. *Le Grew v. Cooke*, 1 B. & P. 332.

*By plaintiff in replevin.*] In replevin, where there were several avowries for rent, the court allowed the plaintiff to pay money into court, with respect to the rent claimed in one of them. *Vernon v. Wynne*, 1 H. Bl. 24.

*By justices of peace.*] In an action against a justice of peace, for any thing done by him in the execution of his office, he may tender amends at any time within one calendar month after notice of action; and if not accepted, he may plead the tender in bar, together with the plea of not guilty. 24 G. 2, c. 44, s. 2. Or if the defendant have neglected to tender amends within that time, he may pay the money into court afterwards and before issue joined, with the leave of the court; *Id.* s. 3; and the court have allowed this to be done even after issue joined. *Nestor v. Newcome*, 3 B. & C. 159. *Devaynes v. Boys*, 7 Taunt. 33.

*In lieu of bail.*] In what cases money may be deposited with the sheriff upon an arrest, and by him paid into court, instead of giving a bail bond,—and in what cases money may be paid into court in lieu of bail,—have been already discussed. *See ante*, pp. 175, 199. In one case, the court of King's Bench allowed money thus paid in lieu of bail, to be converted into a payment of money into court in the ordinary sense of the term. *Hubbard v. Wilkinson*, 8 B. & C. 496, *ante*, p. 199. But the court of Common Pleas have since refused to allow a part of the sum thus paid in, to stand as a payment into court on a plea of tender; *Stultz v. Heneage*, 10 Bing. 561, 2 Dowl. 806; and in a still later case, they have refused to allow it to be converted into an ordinary payment of money into court. *Bail v. Stafford*, 1 Hodg. 316, 4 Dowl. 327.

## SECTION X.

*Plea, &c., of nul tiel record.*

In all cases where a record is set out in any pleading, and the opposite party denies its existence by pleading *nul tiel record*, the issue whether there is in fact such a record or not,

must be tried by the court, and not by a jury, and must be proved by the production of the record itself, or of a transcript or exemplification of it, in open court. If it be a record of the same court, the record itself must be produced. If it be a record of an inferior court, a transcript of it must be produced; and for that purpose, a writ of *certiorari* must issue, directed to the judge of the inferior court, and tested and returnable in term, commanding him to send a transcript of the record to the court in which the action is pending. See the form in the Appendix. But if it be a record of a superior court, then, inasmuch as an inferior court cannot issue a *certiorari* directly to a superior court, the record must first be brought into Chancery by a writ of *certiorari*, sued out with the cursitor, and returnable in chancery; and afterwards an exemplification of it under the lord chancellor's seal, is sent by *mittimus* (also sued out with the cursitor) to the court in which the action is pending.

*The issue is made up and delivered, as in ordinary cases. The conclusion of the issue, giving a day in court to the parties, is always drawn by the counsel or pleader who draws the last pleading, and is embodied in it; so that in making up the issue, you will merely have to copy the pleadings. Enter the issue then on a roll; carry in your roll and docket your entry, as directed post; and direct the officer to have it in court on the day appointed, and he will accordingly give it to the master for that purpose.*

*The party who has to prove the record, should bespeak it, or a transcript or exemplification of it, as above mentioned, so that it may be in court, and delivered to the master, before the time appointed.*

*In the court of Queen's Bench, if the plaintiff have to prove the record, he must first give a notice to the defendant's attorney, in this or the like form: Take notice, that the above-named plaintiff will on — in the court of Queen's Bench at Westminster, produce to the said court the record of the [recovery "or" recognizance] in his [declaration] in this cause mentioned. Dated, &c.; to be intituled in the court and cause, signed in the name of the plaintiff's attorney or agent, and directed to the attorney or agent of the defendant, as in notices in ordinary cases. But if the defendant have to prove the record, then let the plaintiff obtain a rule to produce it from the master on the back of the issue, enter it with the clerk of the rules, and deliver a copy to the defendant's attorney or agent.*

*In the courts of Common Pleas and Exchequer, the plaintiff obtains a rule for judgment, and serves a copy on the defendant's attorney or agent, in all cases, as well when he has to prove the record, (semb.) as when it is to be proved by the defendant. Swinburn v. Taylor et al., 11 Law J., 10, ex. See the forms in the Appendix, and see Begbie v. Grenville, 3 Dowl. 502.*

*Afterwards, on the day appointed by the notice or rules above mentioned, let the party entitled to judgment instruct counsel to move for it; and the opposite party, if he contest it, may instruct counsel to oppose the motion. Upon the motion being made, the master declares whether the record in issue is in court or not: if not in court, or if in court and it do not maintain the issue, the court will order judgment of failure of record to be entered; but if in court, and it maintain the issue, the court then order judgment that the party hath perfected the record, and judgment is afterwards entered accordingly.*

If the judgment be in favour of the plaintiff, it is final in debt, interlocutory in all other actions. If it be interlocutory, and there be no other issue, the plaintiff must have his damages ascertained either upon writ of inquiry, or by reference to the master, in the same manner as after judgment on demurrer. *See post.* But if there also be issues in fact to be tried by a jury, the jury who try the issues will assess the damages on the interlocutory judgment, as mentioned hereafter.

If the defendant obtain judgment, and there be no other issue, he may immediately tax his costs, sign judgment, and sue out execution.

The party in whose favour the judgment is given, is entitled to costs, in the same manner as after verdict in his favour; except that in debt on judgment, if the plaintiff obtain judgment, he shall not be entitled to costs, unless the court or a judge shall otherwise order. 43 G. 3, c. 46, s. 4, and *see post*, tit. "*Costs.*"

## SECTION XI.

### *Plea in abatement.*

#### *How pleaded.*

*Get your plea drawn and signed by counsel, or drawn by a pleader and signed by counsel; engross it on plain paper; annex to it an affidavit of verification, as hereinafter directed; and deliver it to the plaintiff's attorney.*

The affidavit may be in the following form:—

"In the [Queen's Bench]," "Common Pleas," "Exchequer of Pleas.""]

Between J. N. plaintiff,  
and  
J. S. defendant.

J. S. of ———, grocer, the defendant in this suit, maketh oath and saith, that the plea hereunto annexed, is true, in substance and matter of fact.

J. S."

Sworn at, &c.

In the case of nonjoinder, however, the affidavit must also state, with "convenient certainty" the place of residence of the person omitted.—*Vide infra*.

*When to be pleaded.*

A plea to the jurisdiction or in abatement must be pleaded on or before the fourth day after the declaration has been delivered, or filed and notice given. *Hutchinson v. Brown*, 7 T. R. 298. *Brandon v. Payne*, 1 T. R. 689. Formerly these four days were reckoned inclusive; as for instance, if the declaration were delivered or notice served on Monday, the plea must have been delivered on or before the Thursday following. *Harbord v. Perigal*, 5 T. R. 210. *Jennings v. Webb*, 1 T. R. 277. But since, by R. G. H. 2 W. 4, r. 8, any number of days required for a proceeding, are to be reckoned exclusive of the first day and inclusive of the last, unless expressed to be clear days, the court of Exchequer have holden that it is no longer necessary to plead in abatement within four days inclusive, as formerly. *Ryland v. Wormald*, M. S. T. 1837. 5 Dowl. 581. Sunday is reckoned, unless it be the first or last of the four days; if it be the last, the defendant shall have the whole of Monday to plead. *Lee v. Carlton*, 3 T. R. 641.

Formerly if the plaintiff declared in vacation, or within the four last days of term, the defendant was entitled to an imparlance over to the next term, and he might plead in abatement within the four first days of the term, with what was termed a special imparlance; or to the jurisdiction, with a general special imparlance. *Holme v. Dalby*, 3 B. & A. 259. *Doughty v. Lascelles*, 4 T. R. 520. *Evans v. Stevens*, 4 T. R. 227. *Buddle v. Wilson*, 6 T. R. 369. *Brewster v. Capper*, 1 W. Black, 51. But imparlances are now abolished, as we have already seen, *ante*, p. 277; and the defendant must now plead in abatement or to the jurisdiction, within four days after declaration, as above mentioned, in all cases, whether the plaintiff declare in term or vacation.

In strictness the defendant cannot plead, until he is fully before the court. Therefore he must enter a common appearance, before he pleads in abatement or to the jurisdiction. *Wakefield v. Marden*, 2 Chit. R. 8. Formerly, in bailable actions, the defendant must have put in bail, before he could plead in abatement; but as it was often impracticable to perfect the bail before the expiration of the time for pleading, the defendant was merely obliged to put in bail and give

notice thereof before he pleaded; and he afterwards proceeded to perfect his bail in the ordinary way, or if he failed to do so, his plea in that case was deemed a nullity. *Dimsdale v. Nielson*, 2 East, 406. *Hopkinson v. Henry*, 13 East, 170. See *Binns v. Morgan*, 11 East, 411. *Saunders v. Owen*, 2 D. & R. 252. But as putting in or perfecting bail is now no longer an appearance of the defendant, the *capias* not being in strictness process in the action, and that and the arrest being a proceeding collateral to it, the defendant must now in all cases enter a common appearance, before he pleads in abatement, whether a *capias* have issued or not.

*Affidavit of verification.*

By stat. 4 Ann, c. 16, s. 11, no dilatory plea shall be received in any court of record, unless the defendant by affidavit prove the truth thereof, or show some probable matter to the court to induce them to believe that the fact of such dilatory plea is true. And therefore a plea in abatement or to the jurisdiction, being a dilatory plea, must be accompanied by an affidavit of verification, either annexed to it (which is most usual in practice), or on a separate paper; otherwise the plaintiff may treat the plea as a nullity, and sign judgment. *Richards v. Setree*, 3 Price, 197. *Davidson v. Chilman*, 1 Bing. N.C. 297. *Bray v. Haller*, 2 Moore, 213. If annexed to it, the affidavit may be general, in the form above mentioned, and it is not necessary to intitle it in the cause, although prudent and usual to do so; *Prince v. Nicholson*, 5 Taunt. 333; but if wrongly intitled, it will be bad, and the plea may be treated as a nullity. *Richards v. Setree*, 3 Price, 197. If the affidavit be not annexed, it must be special, and state all the facts; see *Dobbin v. Wilson et al.*, 3 Nev. & M. 260; and it must be correctly intitled in the cause. It is not necessary that it should be made by the defendant, but may be made by any person who can swear to the facts stated in the plea. *Anon.* 1 Chit. R. 58. Where the affidavit was sworn in Liverpool, on the very day on which the declaration was filed in London, and before the defendant could have seen it, the court held that it was not such a nullity on that account as to warrant the plaintiff in signing judgment as for want of a plea. *Lang v. Comber*, 4 East, 348. So, its being sworn two days before the date of the plea, in a country cause, was held not to be material. *Poole v. Pembrey*, 1 Dowd. 693. But where it was sworn before the declaration, the court of Exchequer held that the plaintiff might treat it as a nullity and sign judgment. *Westerdale v. Kemp*, 1 Tyr. 260. *Johnson v. Popplewell*, 2 Tyr. 715.

*What pleas may be pleaded.*

*Misnomer.*] Misnomer of either defendant or plaintiff might formerly be pleaded in abatement. *Arch. Pl. & Ev.* 288, 291. No such plea, however, can now be allowed; but instead thereof, "the defendant shall be at liberty to cause the declaration to be amended, at the costs of the plaintiff, by inserting the right name, upon a judge's summons, founded on an affidavit of the right name; and in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the judge shall think fit," 3 & 4 W. 4, c. 42, s. 11. And this application, it should seem, ought to be made within the time formerly given for pleading the same matter in abatement; see *Hinton v. Stevens*, 1 Har. & W. 521; and if that happen to be in vacation, the application must be made to a judge at chambers. *Id.* Where a plaintiff, after issue joined, applied to amend the proceedings, a mistake having been made in his christian name, both in the writ and declaration, the court refused the application, as the defendant could not then make any objection to it. *Moody v. Aslatt*, 3 Dowl. 486. And where the plaintiff sued the defendant in a wrong name, and proceeded to judgment without objection, the court refused to set aside the proceedings. *Smith v. Patten*, 6 Taunt. 115.

Formerly, when misnomer might have been pleaded in abatement, the defendant, in bailable actions, instead of doing so, might have moved to be discharged out of custody, or that the bail bond (if he had given one) might be delivered up to be cancelled upon entering a common appearance, if he applied before the time for pleading in abatement had expired. *Smith v. Innes*, 4 M. & S. 360. *Coles v. Gum*, 1 Bing. 424. And he may do so still, unless the plaintiff can show that he used due diligence to ascertain his right name, within R. G. H. 2 W. 4, s. 32, already mentioned under the title "Capias." *Ladbroke v. Phillips*, 1 Har. & W. 109. This at first was doubted; *Callum v. Leeson*, 2 Dowl. 381; but since the above case of *Ladbroke v. Phillips*, the point is considered as settled. See *Rosset v. Hartley*, 5 Nev. & M. 415. This application should in prudence be made before the defendant has appeared; for if he appear by the wrong name, he will be deemed to have waived the misnomer; and if by the right name, it will not be an appearance in the action. Even obtaining an order in the cause, by which the defendant was described in the same manner as in the writ, has been deemed a waiver. *Nathan v. Cohen*, 3 Dowl. 370. So, where the writ was against Messrs. C. & D. omitting their christian names, and the defendants signed a bail bond in their christian and surnames, this was holden to be a waiver. *Kingston v. Llewellyn*,

1 *Brod. & B.* 529. But signing a bail bond by the initial of the christian name, will not be deemed a waiver, although it correspond with the name in the writ. *Coles v. Gum*, 1 *Bing.* 424. See *Finch v. Cocken*, 3 *Dowl.* 678. Supposing, however, the misnomer not to be waived, the defendant, it should seem, may make this application at any time within four days inclusive after declaration.

*Nonjoinder.*] In actions *ex contractu*, the defendant may plead in abatement, that other persons, jointly liable with him, have not been sued. See *Arch. Pl. & Ev.* 69, 70. The plea, however, must state "that such person is resident within the jurisdiction of the court;" and "the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea," 3 & 4 *W.* 4, c. 42, s. 8.

To this the plaintiff may reply, that the party omitted "has been discharged by bankruptcy and certificate, or under an act for the relief of insolvent debtors." *Id.* s. 9. Or the plaintiff may traverse the plea, and so proceed to trial as in ordinary cases.

But if, instead of replying, the plaintiff elect to commence an action against all the parties, his declaration must be in this form:—

(Venue.) *A. B. by E. F. his attorney [or in his own proper person] complains of C. D. and G. H. who have been summoned to answer the said A. B.; and which said C. D. has heretofore pleaded in abatement the nonjoinder of the said G. H. [&c., the same form to be used, mutatis mutandis, in cases of arrest or detainer.] R. G. H. 4 W. 4, r. 2, s. 20.*

And if the plaintiff, at the trial, prove the liability of the original defendants, but fail to prove the liability of one or more of those named in the plea in abatement, the plaintiff shall have a verdict and judgment against those proved liable; and those not liable shall have a verdict and judgment, and their costs, against him; which costs, however, shall be allowed the plaintiff, in taxation, against the defendants who pleaded in abatement. 3 & 4 *W.* 4, c. 42, s. 10. The statute contains also a proviso "that any such defendant, who shall have so pleaded in abatement, shall be at liberty on the trial to adduce evidence of the liability of the defendants named by him in such plea in abatement." *Id.*

*Coverture, &c.*] The defendant may plead the coverture of herself, or of the plaintiff, in abatement. And it may be necessary to remark that coverture of the defendant must be pleaded in person, and not by attorney. 2 *Saund.* 209. There are also several other matters which may be pleaded in abatement; see *Arch. Pl. & Ev.* 283, &c.; but as they are not usual in practice, it is unnecessary to mention them.

*Privilege.*] Notwithstanding the uniformity of process act, an attorney still retains the privilege of being sued only in the court of which he is an attorney; *Lewis v. Ker*, 5 Dowl. 447. *See ante*, tit. "Attorney;" provided he be not sued in *ouster droit*, or jointly with others not privileged, and that the plaintiff be not an attorney or officer of the court in which the action is brought. *See Arch. Pl. & Ev.* 279. If therefore in such a case he be impleaded in a court of which he is not an attorney, he may plead his privilege. This is not a plea in abatement, but to the jurisdiction. But like all other dilatory pleas, it must be verified by affidavit. *Davidson v. Watkins*, 3 Dowl. 129. *S. C. nom. Davidson v. Chilman*, 1 Bing. N. C. 297. Like all other pleas to the jurisdiction, also, it must be pleaded in person, and not by attorney. *Gill. C. P.* 187.

*Proceedings after plea.*

After plea pleaded, the proceedings are the same as in ordinary cases. In actions for damages, however, the plaintiff should be prepared to prove his damages at the trial; for a judgment in his favour will be final. If he fail to do so, a *venire de novo* must be awarded; for no writ of inquiry will lie. 2 Saund. 211, n. 3. On the other hand, judgment for the plaintiff upon a demurrer to the plea, is merely *respondeas ouster*. *Id.* Where a defendant pleaded in abatement, and the plaintiff demurred, upon which judgment of *respondeas ouster* was given; the defendant then pleaded in bar, and issue in fact was thereupon joined: it was holden that in proceeding to trial upon this latter issue, it was not necessary to enter the plea in abatement, demurrer and judgment, on the nisi prius record, although they must necessarily appear upon the plea roll. *Pepper v. Whalley*, 1 Har. & W. 480. 5 Nev. & M. 437.

After issue on a plea in abatement is found for the plaintiff, the court will not grant a new trial, even upon payment of costs. *Shaw v. Hislop*, 4 D. & R. 241.

*Cassetur breve.*] Where a defendant pleads a sufficient plea in abatement, which you cannot answer or demur to, you may enter on the roll a *cassetur breve*; which is nothing more than a judgment that the writ be quashed, pronounced at the prayer of the plaintiff. *See the form of the entry, Arch. Forms*, 556. It is entered on a roll immediately after the declaration and plea. But the court will not set aside the plea, or by amendment enable the plaintiff to evade the effect of it, even although the time for bringing a new action may have expired. *Roberts et al. v. Bate et al.*, 6 Ad. & El. 778.



## SECTION XII.

*Plea to the jurisdiction and claim of consuance.*

*Plea to the jurisdiction.*] As to the matter of the pleas, and the form of them, see *Arch. Pl. & Ev.* 276—282. They are pleaded in the same manner, within the same time, and verified by affidavit in the same manner, as pleas in abatement. See *ante*, p. 297, &c.

*Claim of consuance.*] Where there is a franchise, either by letters patent or prescription, of holding pleas within a particular jurisdiction, if a suit properly determinable in the inferior court, be commenced in any of the courts at Westminster, although the defendant in such a case cannot plead to the jurisdiction of the superior court, yet the owner of the franchise may claim consuance of the plea. 1 *Ro. Abr.* 489, 490. *Bac. Abr. Pleas*, E. 1. *Arch. Pl. & Ev.* 276. This may be done at any time before the plaintiff has declared. *Broune v. Renoward*, 12 *East*, 12. See the form of the entry of the claim upon the roll, 12 *East*, 15. It very seldom occurs in practice; and the few modern instances to be found in the books, are of claims by the universities of Oxford and Cambridge. See *Williams v. Brickenden*, 11 *East*, 543. *Broune v. Renoward*, *supra*. *Thornton v. Ford*, 15 *East*, 643. *Hendrick v. Kynaston*, 1 *W. Bl.* 454. *Bac. Abr. Courts*, D. 3. Where, in a late case, the chancellor of the university of Oxford, instead of claiming consuance of a suit commenced in the court of Queen's Bench against a member of the university, cited the plaintiff's attorney to appear before him, and on his failing to do so, adjudged him to stay the proceedings in the action and to pay the costs, and issued a warrant for these costs: the court of Queen's Bench, upon application, awarded a prohibition, holding that the chancellor of the university had no authority whatever to proceed in this manner. *R. v. Chancellor of the University of Oxford*, 11 *Law J.*, 37, *qb.*

## SECTION XIII.

*Plea puis darrein continuance.*

Wherever a defence to the action arises after the plea pleaded and before verdict, or it seems even after verdict but before the day in banc, *Lovell v. Eastaff*, 3 *T. R.* 554, and see *Alder v. Park*, 5 *Dowl.* 16, 2 *Har. & W.* 78, the defendant, by having pleaded, is not precluded from availing himself of it, but he may plead it *puis darrein continuance*, whether it be matter of abatement or in bar. See more fully upon this subject, *Arch. Pl. & Ev.* 316—319. It may be pleaded either in banc or at *nisi prius*.

Formerly, when the proceedings in a cause were connected by what were termed continuances, the defendant was limited to pleading such matter of defence only as had arisen since the last continuance; see *Bretherton v. Osborne*, 1 Dowd. 457; and if he allowed the time to pass, to which the cause was then continued, without pleading, he could not afterwards plead his new defence, unless he had the leave of the court to plead it *nunc pro tunc*. And the court often granted this indulgence, where it appeared to them that the justice of the case required it, and where the omission to plead in time was satisfactorily accounted for; at the same time, imposing such terms as they deemed right. See *Duff v. Campbell*, 3 B. & A. 577. *Soutten v. Soutten*, 1 D. & R. 521. *Willoughby v. Wilkins*, 2 Smith, 396. *R. v. Taylor*, 3 B. & C. 612.

But continuances are now abolished; *R. G. H.* 4 W. 4, s. 2; and therefore it has been deemed necessary to provide, by *R. G. H.* 4 W. 4, r. 2, s. 2, that "in all cases in which a plea *pais darrein continuance* is now by law pleadable in banc or at *nisi prius*, the same defence may be pleaded, with an allegation that the matter arose after the last pleading, or issuing of the jury process, as the case may be." But the power of pleading thus, is very much narrowed by the same rule of court, by which it is ordered that "no such plea shall be allowed, unless accompanied by an affidavit, that the matter thereof arose within eight days next before the pleading of such plea, or unless the court or a judge shall otherwise order." See *Dudden v. Triquet*, 4 Mees. & W. 676. Also, as a plea *pais darrein continuance* is deemed a dilatory plea, whether pleaded in abatement or bar, it must be verified by affidavit, in the same manner as a plea in abatement. *Willoughby v. Wilkins*, 2 Smith, 396. *Prince v. Nicholson*, 5 Taunt. 333.

Formerly also, all matters of defence arising *pais darrein continuance* before the return of the *venire*, must have been pleaded in banc; and all such matters arising since the return of the *venire*, must have been pleaded at *nisi prius* or at the assizes. But as by the above rule the matter of defence must now be pleaded within eight days after it arises, it may be impracticable to plead it at the sittings or assizes, as that can be done only after the cause is called on and the jury sworn. In all cases, therefore, where the matter of defence arises more than eight days before the cause is called on, it must be pleaded in the ordinary way, by delivering the plea and affidavit to the plaintiff's attorney or agent. If pleaded at *nisi prius*, it may be engrossed on paper, as in ordinary cases, *Myers v. Taylor*, 1 Ry. & M. 404, 2 C. & P. 306, and handed into court by the defendant's counsel; it is then annexed to the record, and returned to the court above, where the further proceedings will be carried on; and the jury are discharged from giving a verdict. It may be necessary to observe, that the court cannot refuse to receive the plea, *Prince v. Nichol-*

son, 5 Taunt. 337. *Paris v. Salkeld*, 2 Wils. 137, 139, even although it be bad and informal on the face of it. *Fitch v. Toulmin*, 1 Stark. 62. But the courts have set aside pleas of release, pleaded *puis darrein continuance*, upon a strong case being made out of collusion or fraud, &c. See *Jones v. Herbert*, 7 Taunt. 421. *Innel v. Newman*, 4 B. & A. 419, and see *Dowson v. Levi*, 4 B. & A. 249.

After a defendant has thus pleaded *puis darrein continuance*, the plaintiff (if he will) may discontinue the action, without paying costs. *Wollen v. Smith*, 9 Ad. & El. 505.

*Costs.*] The defendant, if he succeed, is only entitled to his costs incurred since the plea *puis darrein continuance*. *Lytleton v. Cross*, 4 B. & C. 117. If the plaintiff recovers, he is entitled of course to his costs, as in ordinary cases.

#### SECTION XIV.

##### Judgment by default.

*In what cases.*] If a defendant do not plead within the time limited for that purpose by the practice of the court, a notice to plead (which in practice is always indorsed on the declaration) being given, *Heath v. Rose*, 2 New Rep. 223, a rule to plead given and expired, see *Nias v. Spratley*, 4 B. & C. 386, and a plea demanded, where necessary; *Remington v. Johnson*, 2 B. & C. 803; or if he plead a plea which is a nullity; see *ante*, p. 274; see *Booth v. Whitehead*, 8 Dougl. 8; or if the defendant, being under terms of pleading issuably, plead a plea, &c. which is not issuable; *ante*, pp. 279, 280, the plaintiff may sign judgment by default, for want of a plea. See *ante*, pp. 282, 283. Even where an order for time to plead was obtained, with the knowledge of the plaintiff's attorney, but the order was not served before the time for pleading expired, and the plaintiff signed judgment: the court held that he had a right to do so, as he was not bound to take notice of a judge's order, until it was served. *Sedgwick v. Allerton*, 7 East, 542. But a judgment cannot be signed after a plea has been delivered, although it be delivered after the time for pleading has expired: and therefore where the time for pleading expired on Monday, and a plea was delivered at the office of the plaintiff's attorney at ten minutes before eleven o'clock on Tuesday morning; and it appeared that the clerk at that time had gone out, and had taken the papers with him for the purpose of signing judgment, which he did in the course of the day: the court upon application set aside the judgment for irregularity. *Leigh v. Bender*, 1 Gale, 269, 4 Dougl. 201. But where, in such a case, the defendant's attorney called at the office of the plaintiff's attorney for the purpose of delivering the plea, but then find-

ing that the clerk had gone to the Temple to sign judgment, he ran after him, and tendered the plea to him, but not until after the judgment was signed: the court held the judgment regular. *Stafford v. Nichols*, 4 Bing. N. C. 693.

*When, and how signed.*] Before judgment can be signed for want of a plea, the defendant must be fully before the court. Where in a nonbailable action the defendant's attorney indorsed an undertaking to appear, and the plaintiff afterwards proceeded in the action as if an appearance had been entered, and signed judgment for want of a plea: the court held it to be irregular, and set it aside. *Martin v. Mahony*, 5 D. & R. 609. And in a similar case, *Williams, J.* held the judgment to be a nullity altogether, and that the defendant therefore was not precluded by any lapse of time from moving to set it aside. *Roberts v. Spurr*, 1 Har. & W. 201, 3 Dowl. 551. Therefore where the defendant has not entered an appearance, the plaintiff must enter one for him, before he can sign judgment. Where the plaintiff sued out a writ against three persons, for three different causes of action, filed three declarations, entered but one common appearance for the three, and signed three judgments: the court held this to be clearly irregular, and set aside the proceedings. *Cox v. Bucknell*, 5 B. & A. 892. If proceedings be stayed until the plaintiff give security for costs, he cannot sign judgment by default until the morning after such security has been given, although the time for pleading had expired before the application for security for costs was made. *Decker v. Thompson*, 3 B. & P. 319, and see *Glover v. Whatmore*, 5 B. & C. 769. And where proceedings are stayed by an order for particulars, the defendant has the same time to plead, after delivery of the particulars, that he had at the return of the summons. *R. G. H. 2 W. 4, s. 48*. Formerly, if his time for pleading were then out, or if it expired on the same day, judgment could not in that case be signed for want of a plea until the afternoon of the day after the delivery of the particulars, unless otherwise ordered by the judge. *Id.* So, if a demand of plea were given on the last day for pleading or after it, judgment could not be signed until the opening of the office in the afternoon of the day after the demand was made; *R. G. H. 2 W. 4, s. 66*; but if the demand were made before that time, judgment might be signed in the morning of the day after the time for pleading had expired. *Blundell v. Hansom*, 2 Mees. & W. 243, overruling *Kemp v. Fyson*, 3 Dowl. 265. And the same practice in the Common Pleas; *R. H. 1 Vict. C. P.*; and the same in the Queen's Bench, except where notice was given to plead within the first four days of term, in which case judgment could not be signed until after the opening of the office in the afternoon of the fifth day. *Duncan v. Carleton*, 2 B. & C. 798. But now, since the office is no longer open a second time, in the evening, in the courts of Queen's Bench and

Common Pleas, in those courts at least judgment may now in all cases be signed in the morning of the day on which the party is entitled to sign it, without waiting for the afternoon.

Where you are in a situation to sign judgment, *make an incipitur of the declaration on plain paper, and the like on the roll; take them to the master's office, and the proper clerk there will sign the judgment. If it be interlocutory, you may proceed to sue out and execute a writ of inquiry, or, if the action be upon a bill of exchange or promissory note, you may move to refer it to the master, to compute principal and interest upon it. If it be final, you may proceed to tax your costs, and sue out execution.* It is interlocutory in all personal actions but debt; and even in debt, such a judgment is not irregular, *Mackenzie v. Gayford*, 5 Dowl. 403, although very unusual in practice. See as to the case of debt on bond, within stat. 8 & 9 W. 3, c. 11, s. 8, *post*, tit. "*Suggestion of breaches.*"

Where there are two defendants, and one allows judgment to go by default, and the other pleads to issue and obtains a verdict: if the action be *ex contractu*, the plaintiff cannot assess damages or have final judgment against the defendant who suffered judgment by default, *Morgan v. Edwards*, 6 Taunt. 398; but otherwise in actions *ex delicto*.

*In what cases, and how, set aside.*] If the judgment be signed, where it ought not, or if there be any thing irregular in the manner of signing it, the defendant may move to set it aside for irregularity with costs. And even a regular judgment, may in general be set aside upon payment of costs, on an affidavit of merits,—the affidavit stating expressly that the defendant has a good defence to the action "on the merits," saying that he has "a good and meritorious defence," *Bower v. Kemp*, 1 Crompt. & J. 287, or "a good defence to the action," *Pringle v. Marsack*, 1 D. & R. 155, or that he has "a good defence on the merits," without adding, "to this action," *Tate v. Bodfield*, 3 Dowl. 218, or that, "he hath merits and good cause of defence to this action," *Lane v. Isaacs*, 3 Dowl. 652,—have been holden insufficient. The affidavit must be made by the defendant himself, or by his attorney, or by the attorney's managing clerk who has the management of the cause. *Rowbotham v. Dupree*, 5 Dowl. 557. But where the agent in town swore that from the instructions he had received from the country attorney, he believed that the defendant had a good defence to the action on the merits, the court of Exchequer held it to be sufficient. *Schofield v. Huggins*, 3 Dowl. 427. The court however will not set aside a regular judgment, to let in a plea of the statute of limitations, *Willet v. Allerton*, 1 W. Bl. 35, or, in an action on an attorney's bill, that no signed bill was delivered a month before action, *Biggs v. Maxwell*, 3 Dowl. 497, S. C. *nom.* *Holmes v. Grant*, 1 Gale, 59. *Beck v. Mordaunt*, 4 Dowl. 112,

1 *Hodg.* 196, or the like; but the court will allow a plea of infancy, *Delafeld v. Tanner*, 5 *Taunt.* 856, or of the defendant's bankruptcy and certificate. *Evans v. Gills*, 1 *B. & P.* 52.

It is seldom that a defendant knows of judgment being signed against him for want of a plea, until he is served with notice of inquiry, or, in debt, until execution is actually executed. It is sufficient therefore if he move to set aside the judgment within a reasonable time after he has been made acquainted with it. Where notice of inquiry was given on the 15th, and the motion was not made until the 23rd, the very day on which the inquiry was to be executed, the court of Exchequer held that it was not too late. *Hill v. Mills*, 2 *Dowl.* 696. Where a rule *nisi* had been obtained to set aside an interlocutory judgment for irregularity, and it appeared upon showing cause that the plaintiff had previously, upon perceiving his error, abandoned the judgment, although it was not actually struck out in the book: *Littledale, J.* discharged the rule, but without costs. *Robinson v. Stoddart*, 5 *Dowl.* 266. The affidavit must in all cases state expressly that judgment has been signed; it is not sufficient to leave the court to infer it, from stating merely that the defendant has been served with a rule to compute, *Classey v. Drayton*, 6 *Mees. & W.* 17, or the like.

## SECTION XV.

## Writ of Inquiry.

*In what cases.*] In all personal actions except debt, if the defendant allow judgment to pass against him by default, or if the plaintiff have judgment upon a demurrer or trial by the record, the plaintiff may have his damages assessed upon a writ of inquiry. And even in debt, although the court cannot (except in some particular cases by statute) compel the plaintiff in such a case to sign an interlocutory judgment, so as to render it necessary for him to sue out and execute a writ of inquiry, *Taylor v. Capper*, 14 *East*, 442, yet he may, if he will, do so, and have his damages for the detention of the debt assessed by a jury. Thus in an action of debt on a judgment of seventeen years' standing, where the defendant allowed judgment to go by default, the court held that the plaintiff had a right to damages for the detention of the debt, and to a writ of inquiry to ascertain their amount. *Blackmore v. Memyng*, 7 *T. R.* 446, and see *Nelson v. Sheridan*, 8 *T. R.* 395. As to debt for tithes, see *Baile v. Hodgetts*, 1 *Bing.* 182. Where in debt on bond the court referred it to the prothonotary to compute the interest by way of damages, it was holden not to be error. *Holdipp v. Otway*, 2 *Saund.* 107. But this is very unusual; for as the penalty of the bond is double the amount of the principal secured by

it, and as the plaintiff may sign a final judgment for the whole penalty, if then the interest do not exceed the principal, it is useless to have a writ of inquiry or reference to the master, as the plaintiff may levy the amount both of the principal and interest under the judgment first signed. Even in debt on a bail bond, *Moody v. Pheasant*, 2 B. & P. 446, or on a replevin bond, *Middleton v. Bryan*, 3 M. & S. 155, the plaintiff may have final judgment upon default, without executing any writ of inquiry, and may levy by his execution such smaller sum as may be really due to him. In debt for use and occupation, the plaintiff may sue out and execute a writ of inquiry, see *Arden v. Connell*, 5 B. & A. 885, or he may take his final judgment by default. Even in debt on simple contract, the plaintiff is entitled to sign a final judgment by default, and the court will not compel him to execute a writ of inquiry, although the amount of the debt be disputed; but they may refer it to the master to ascertain what is really due. *Taylor v. Capper*, 14 East, 442.

In assumpsit on a foreign judgment, the plaintiff must execute a writ of inquiry; the court will not refer it to the master to ascertain what is due for principal and interest. *Messin v. Ld. Massarene*, 4 T. R. 493. See *Doran v. O'Reilly*, 5 Dougl. 233. But in assumpsit on a bill of exchange or promissory note, the court, instead of compelling the plaintiff to execute a writ of inquiry, will refer it to the master to compute the principal and interest, *Shepherd v. Charter*, 4 T. R. 275. *Rashley v. Salmon*, 1 H. Bl. 252. *Eyre v. Bank of England*, 1 Bligh, 582, and exchange and re-exchange. *Goldsmid v. Tuite*, 2 B. & P. 55, but see *Napier v. Schneider*, 12 East, 420, unless the bill be for a sum in foreign money. *Maunsell v. Ld. Massarene*, 5 T. R. 87.

In covenant also, a writ of inquiry must be executed; see *Denison v. Mair*, 14 East, 622; unless it be for the payment of rent or other sum certain, in which case the court will refer it to the master to ascertain what is due. *Berthen v. Street*, 8 T. R. 326. *Byrom v. Johnson*, 8 T. R. 410. *Wingfield v. Cleverley*, 13 Price, 53. *Campion v. Cranoshay*, 6 Taunt. 356.

In trespass and case, of course, a writ of inquiry must be executed. But in all these cases, the suing out and executing a writ of inquiry, is merely to inform the conscience of the court; for the court may, if they will, with the consent of the plaintiff, assess the damages themselves; 2 Saund. 102, n. 2. *Gould v. Hammersley*, 4 Taunt. 148; and it is upon this principle, that in cases where mere computation is required, the court refer it to the master to compute the damages.

As to the assessment of damages in debt on bond, conditioned to perform covenants, &c., where breaches are assigned, see *post*. Formerly in this case the assessment of damages took place before a judge at *nisi prius*; but now, by stat. 3 & 4 W. 4, c. 42, s. 16, they must be assessed

before the sheriff, and the writs of inquiry be directed to him accordingly.

Where a jury do not assess damages where they ought, if their assessment would have been in the nature of an inquiry and not of a verdict, as if, for instance, they were to omit to assess contingent damages upon a count of a declaration demurred to, or the like, the omission might be remedied by a writ of inquiry. But if their finding for the plaintiff be in the nature of a verdict, and they omit to find damages,—as for instance, where in an action for a libel there were several pleas, and upon some of them, which went to the whole cause of action, the jury found for the defendant, and found for the plaintiff as to the residue, but without assessing damages, and the pleas found for the defendant afterwards turned out to be bad, and the plaintiff had judgment *non obstante veredicto*: the court held that the omission could not be remedied by a writ of inquiry. *Clements v. Lewis*, 3 Brod. & B. 297. The reason for the distinction, as laid down by the old authorities upon the subject, is, that in the latter case the jury are liable to attain, in the former not; but whether, as attain has been abolished, the court would now rule in the same manner as in *Clements v. Lewis*, may possibly be doubted. In a recent case, where special pleas alone were pleaded, and the jury found for the defendant generally, but the pleas turning out to be bad the plaintiff had judgment *non obstante veredicto*, Parke, J. held that the plaintiff had a right to have his damages assessed upon a writ of inquiry, as a matter of course. *Shephard v. Halls*, 3 Dowl. 453.

But if the defendant plead as to part, and suffer judgment by default as to the residue, no writ of inquiry can be executed, but the jury who try the issue, will assess the damages upon the judgment by default; *Dicker v. Adams*, 2 B. & P. 163; unless indeed the plaintiff choose to enter a *nolle prosequi* as to the part pleaded to. So, if one defendant plead, and another allow judgment to go by default, no writ of inquiry can be executed, as the damages on the judgment by default will be assessed by the jury who try the issue; see *post*, tit. "Damages;" unless the plaintiff enter a *nolle prosequi* as to the defendant who pleaded.

[*Notice of inquiry.*] In town causes, eight days' notice of inquiry must be given, if the defendant reside within forty miles of London; or fourteen days' notice, if he live at a greater distance: the first day exclusive, the last inclusive. *R. M. 4, A. (c)*. *R. H. 39 G. 3, Ex.* And Sunday is reckoned; *R. M. 4, A. (c)*; so are the days intervening between "Thursday next before and Wednesday next after Easter day," although not reckoned in other proceedings. *R. G. E. 2 W. 4*,



lodgings, and the people of the house refused to tell where he had gone to, the court of Exchequer granted a rule that leaving the notice of inquiry at his late lodgings, and sticking up a copy in the master's office, should be deemed good service, unless cause to the contrary were shown within a week. *Watson v. Delcroix*, 2 Cr. & M. 425.

*The writ.*] The writ is tested in term time. But it may be made returnable either in term or vacation. 1 W. 4, c. 7, s. 1. *Engross it upon parchment; and if it issue from the Common Pleas or Exchequer, get it signed by the clerk at the master's office; get it sealed; indorse upon it the time at which it is to be executed, thus: "Notice has been duly given that this writ of inquiry will be executed on —, between the hours of — at —. A. B. plaintiff's attorney." Then leave it at the sheriff's office to be executed.* In London and Middlesex this must be done on the day before the writ is to be executed, at the latest. R. H. 23 G. 3, K. B. If there be two defendants, and both allow judgment to go by default, there can be but one writ of inquiry against both, even in actions *ex delicto*. *Mitchell v. Milbank*, 6 T. R. 199.

*Execution of it.*] By stat. 6 G. 4, c. 50, s. 52, upon writs of inquiry executed in London, or in any county in England or Wales, the jurors must be qualified in like manner as jurors at *nisi prius* in the same county, &c.; but if executed in any liberty, franchise, city, borough or town corporate, not being counties, or in any city, borough or town being a county of itself, the jurors may be of the same description as was usual before the passing of this act. Before this act, the jurors summoned upon writs of inquiry, were often persons in a very inferior rank of life; and it was then a very common practice to apply for a rule directing the sheriff to summon a good jury. Since this act, however, these applications are very much disused. But still, if the cause be of that importance that the damages ought to be assessed by a special jury, there is no objection to order the sheriff to summon a jury to be taken from the special jury book, and you may have this done upon application; *Price v. Williams*, 5 Dougl. 160; and the costs of such a jury will be allowed on taxation. *Wilkinson v. Malin*, 1 Cr. & M. 237. By R. G. H. 2 W. 4, s. 101, there shall be no rule in such a case, but an order shall be made by a judge upon summons.

At the day appointed, having subpoenaed your witnesses, attend with them at the place and time mentioned in the notice, and the counsel or attorneys for the respective parties will be heard, the witnesses examined and cross-examined, &c., and the jurors deliver their verdict, in a manner very similar to a trial at *nisi prius*. After which the under-sheriff

will prepare the inquisition on parchment, and get the jurors to sign it.

As to the evidence: the defendant, by allowing judgment to pass against him by default, admits the cause of action as stated in the declaration, and that the plaintiff is entitled to some damages; and the only matter in dispute between them, is the amount of the damages. In some cases, however, it is necessary to prove nearly the whole cause of action, in order to prove the damages sustained by the plaintiff,—as in actions for assault and battery, false imprisonment, trespass to land or goods, trover, and the like; even in actions on bills of exchange or promissory notes, it is not necessary to produce them to the jury, *Lane v. Mullins*, 11 *Law, J.*, 51 *qb.*; nor is it necessary to prove the drawing or indorsement, &c. *Green v. Hearne*, 3 *T. R.* 301. *Anon.* 3 *Wils.* 155. So, in an action for slander, where no special damage is laid, it is not necessary that the plaintiff should give evidence at all; *Tripp v. Thomas*, 3 *B. & C.* 427; for as the jury form their estimate of the damages in such a case, from the effect the slander is calculated and likely to have had upon the character and prospects of the plaintiff, and not from evidence of any damage actually sustained, they can do so as well from the admitted cause of action on the record, as from any evidence that can be given of it. On the other hand, the defendant will not be allowed to give evidence which goes to prove that he is not liable at all, and that the action should not have been brought against him:—as for instance, in an action on a bill of exchange, the defendant cannot give evidence impeaching the consideration for it; *Shepherd v. Chester*, 4 *T. R.* 275; or in an action for goods sold, that he purchased them merely as agent for another, *De Gaillon v. L'Aigle*, 1 *B. & P.* 368, or the like, because such defences go to the whole cause of action; but where in an action for work and labour, the under-sheriff prevented the defendant from cross-examining the plaintiff's witnesses, to show that a part of the work was done on the retainer of another person, the court held that the under-sheriff was mistaken, and they set aside the inquisition. *Williams v. Cooper*, 3 *Dowl.* 204.

On the execution of a writ of inquiry, the jury ought to give interest, in those cases in which the courts at Westminster would allow it. — *v. Edmunds*, 6 *Taunt.* 346.

*Final judgment.*] Upon the writ being returned, “a rule for judgment may be given, costs taxed, final judgment signed, and execution issued forthwith, unless the sheriff or other officer, before whom the same may be executed, shall certify under his hand, upon such writ, that judgment ought not to be signed, until the defendant shall have had an opportunity to apply to the court, to set aside the execution of such writ,

or one of the judges of the said courts shall think fit to order the judgment to be stayed until a day to be named in such order." 1 W. 4, c. 7, s. 1. A rule for judgment, however, is now no longer required; but final judgment may be signed at the expiration of four days from the return of the writ of inquiry. R. G. H. 2 W. 4, s. 67. By stat. 1 W. 4, c. 7, s. 2, a power is given to the judge, before whom a cause is tried, to certify that execution ought to issue forthwith, or at any certain day to be named, and judgment may be entered up and execution sued out accordingly, although it may happen to be in vacation. And this part of the statute has since been extended to judgments and executions on writs of inquiry, by stat. 3 & 4 W. 4, c. 42, s. 16.

At the time above mentioned, call at the sheriff's office, and the clerk there will give you the writ and return; then tax your costs, and sign judgment, as upon a *postea*, and sue out execution. The court may afterwards compel the plaintiff's attorney to file the inquisition; *Townsend v. Burns*, 1 Cr. & M. 177; or if the sheriff have it, may compel him to return it. *Stockdale v. Hansard*, 8 Dougl. 297. If the action be *assumpsit*, debt or covenant, and the damages do not exceed 20*l.*, the master will tax the costs on the reduced scale laid down in the directions to taxing officers, *post*, tit. "Costs." See *Heppell Leigh*, 5 Dougl. 40.

#### SECTION XVI.

##### *Reference to the master to compute principal and interest.*

In *assumpsit* on a bill of exchange or promissory note, if the plaintiff have interlocutory judgment, the court, instead of putting him to execute a writ of inquiry, will refer it to the master to compute principal and interest on the bill or note, *Shepherd v. Charter*, 4 T. R. 275. *Rashley v. Salmon*, 1 H. Bl. 252. *Eyre v. Bank of England*, 1 Bligh, 582, and exchange and re-exchange; *Goldsmid v. Taite*, 2 B. & P. 55; but see *Napier v. Schneider*, 12 East, 420; and they have done so, even where the bill or note had been lost or stolen, and a copy of it only could be produced. *Brown v. Messiter*, 3 M. & S. 281. *Allen v. Miller*, 1 Dougl. 420. *Clarke v. Quince*, 3 Dougl. 26. *Sanderson v. Lee*, 7 Dougl. 97. But they will not do so in *assumpsit* on a bill for a sum in foreign money, *Marmell v. Lord Massarene*, 5 T. R. 87, or on a foreign judgment. *Moss v. Lord Massarene*, 4 T. R. 493. But see *Doran v. O'Reilly*, 5 Dougl. 233.

In debt, the court will seldom grant a rule to compute. In debt on judgment, if the plaintiff seek damages for the detention of the debt, the court will not refer it to the master to

compute them. *Nelson v. Sheridan*, 8 T. R. 395. Nor will they do so in debt on simple contract, even for rent, or for use and occupation; see *Campion v. Crayshaw*, 6 Taunt. 356; nor in debt on a bastardy bond. *Cooke v. Pettit*, 2 Wils. 5. They may do so, no doubt; see *Holdipp v. Otway*, 2 Saund. 107; but in practice they never do. In debt for rent upon lease, however, or debt on a mortgage deed or the like, they usually grant a rule to compute. See *Campion v. Crayshaw*, *supra*.

In covenant for a sum certain, as for rent upon a lease, *Byrom v. Johnson*, 8 T. R. 410, *Campion v. Crayshaw*, *supra*. *Wingfield v. Cleverley*, 13 Price, 53, or for principal and interest upon a mortgage deed; *Berthon v. Strut*, 8 T. R. 326; or for the arrears of an annuity, *Alloway v. Hill*, 2 Chit. 32, the court will grant a rule to compute; but not in an action on a covenant to indemnify, particularly if there be any doubt as to the amount of damages. *Denison v. Mair*, 14 East, 622.

In trespass or case, the court will not refer the damages to the master, but the plaintiff must execute a writ of inquiry.

Where there are two or more counts in a declaration, one of which is for a cause of action which the court will refer to the master, and the others are not, the plaintiff may obtain a rule to compute as to the former, and enter a *nolle prosequi* as to the latter. *Heald v. Johnson*, 2 Smith, 44. *Duperoy v. Johnson*, 7 T. R. 473. *Jones v. Skiel*, 6 Dowl. 579.

*Rule, &c.*] The rule cannot be moved for, before the judgment is signed; *Moses v. Compton*, 6 M. & S. 381; but it may be moved for on the same day. *Pocock v. Carpenter*, 3 M. & S. 109. *Russen v. Hayward*, 5 B. & A. 752. The rule is, of course, a rule nisi. And it is served by delivering it to the defendant, or leaving it for him at his place of residence with some person authorized to take in papers for him. Where it was served upon a female servant of the defendant, at his dwelling-house, it was holden sufficient. *Thomas v. Lord Ranelagh*, 5 Dowl. 258. And the like, where it was served at the dwelling-house upon a female, who was sworn to be a part of the defendant's family; *Weedon v. Lipman*, 9 Dowl. 111; or on a female at his dwelling-house, who was in the habit of receiving messages for him there. *Edwards v. Napier*, 9 Dowl. 177. But where it was left for him in the apartments in which he resided, no person being there at the time, *Chaffers v. Glover*, 5 Dowl. 81, where it was served on the landlady of the house where he lodged, *Salisbury v. Sweetheart*, 5 Dowl. 243, or on a workman on the premises of the defendant, *Hitchcock v. Smith*, 5 Dowl. 248, or on a shopman or warehouseman at his place of business, *Ibotson v. Phelps*, 9 Law J., 232, *ex. James v. Westdale*, 9 Dowl. 104, the service has been holden insufficient. So, service at the last place of the defendant's residence has been holden insufficient, where it

appeared that he had previously ceased to reside there, *Black v. Cloup*, 5 *Dowl.* 271, or had gone abroad; *Neilson v. Shee*, 8 *Dowl.* 32; but in such a case, upon a satisfactory affidavit being produced as to the efforts made to find him, the court will allow a copy of the rule to be stuck up in the office, and grant a rule to show cause why the service should not be deemed good, to be served in the same manner as the former rule. *Id.* *Broom v. Stittle*, 1 *Har. & W.* 672. *Sealey v. Robertson*, 2 *Dowl.* 568. Where there are two defendants, service of the rule upon one of them is sufficient. *Figgins v. Ward et al.*, 2 *Cr. & M.* 4241. *Carter v. Southall*, 3 *Mees. & W.* 128. *Amlot v. Evans et al.*, 7 *Mees. & W.* 462, 10 *Law J.*, 120, *ex.*, and see *Grant v. Stoneham et al.*, 7 *Dowl.* 126.

It will be no answer to this rule to show any irregularity in the judgment, *Marryat v. Winkfield*, 2 *Chit.* 119. *Deely v. Burton*, 2 *Har. & W.* 138, or in the proceedings previous to it; *Pell v. Brown*, 1 *B. & P.* 369; but such irregularity must be made the subject of a substantive motion. Nor is it any answer, that the defendant has filed a bill in equity against the plaintiff for an account. *Berthon v. Street*, 8 *T. R.* 326.

In vacation, this reference to the master may be obtained upon summons, and the judge will grant a fiat for a rule. Upon production of this fiat, and a motion paper signed by counsel, the proper officer will draw up the rule.

Upon production of the rule and the judgment paper, the master will compute the principal and interest, tax costs, and sign judgment, as in ordinary cases. In the court of Common Pleas, a previous notice of the time appointed for computing the principal and interest must be given to the defendant; *Branning v. Patterson*, 4 *Taunt.* 487; and the same in the Exchequer; but this is not necessary in the court of Queen's Bench.

#### SECTION XVII.

#### Replication, &c.

*Rule to reply, rejoin, &c.*] The defendant may rule the plaintiff to reply, or surrejoin, &c. and the plaintiff may rule the defendant to rejoin or rebut, &c. These are four day rules, within which time the party should plead as required, otherwise the opposite party may sign judgment, as shall be mentioned presently. Even where the defendant's plea concluded to the country, and the plaintiff had only to add the *similiter*, yet because he did not deliver the *similiter* to the defendant, upon being ruled to reply, the court held that the defendant was warranted in signing judgment of *non pros.* *Hollis v. Buckingham*, 3 *D. & R.* 1. But if in such a case the plaintiff

be not ruled, he may add the *similiter* in making up the issue, without delivering it to the defendant. Where the *similiter* was by mistake omitted, the court have set aside the verdict. *Griffith v. Crockford*, 3 Brod. & B. 1. But there are cases in which they have allowed the record to be amended, after verdict, by adding or amending it. See *post*, tit. "Amendment." And where the defendant's last pleading, concluding to the country, concluded with an "&c.," and was so in the issue and *nisi prius* record, the court held that after the verdict the "&c." might be deemed to include the *similiter*. *Swain v. Lewis*, 3 Dowl. 700.

Formerly, in the court of Common Pleas, these rules were merely entered, not served; but now it is decided that they must be served. *Pound v. Lewis*, 2 Dowl. 700. *Vide infra*. They expire in four days, inclusive of the day of service; *Driver v. Blakeway*, M. 1829, M. S.; within which time the party must reply, &c. otherwise the opposite party may sign judgment. But no replication or subsequent pleading shall be delivered between the 10th August and 24th October; 2 W. 4, c. 39, s. 11; and by R. G. M. 3 W. 4, s. 8, where the time for replying, &c. shall not expire before the 10th August, the party shall have the same time for replying, &c. after the 24th October, as if the preceding pleading had been delivered on that day.

By R. G. H. 2 W. 4, s. 53, "a rule to reply may be given at any time when the office is open." And as by stat. 2 W. 4, c. 39, s. 11, a plaintiff may now take all necessary proceedings to judgment, as well in vacation as in term, he may also draw up his rules to rejoin, rebut, &c. at any time when the office is open.

It may be necessary to mention, that where a defendant is under terms to rejoin gratis, he must rejoin, although no rule to rejoin be given, and must do so within 24 hours after a rejoinder has been demanded. *Clarke v. Adams*, 2 Tyr. 755.

*Demand of replication, &c.*] By R. G. T. 1 W. 4, s. 8, "no judgment of *non pros* shall be signed for want of a replication or other subsequent pleading, until four days next after a demand thereof shall have been made, in writing, upon the plaintiff, his attorney or agent, as the case may be." But by R. G. H. 2 W. 4, s. 54, "service of a rule to reply or plead any subsequent pleading, shall be deemed a sufficient demand of a replication or such other subsequent pleading." And it has been ruled by the court of Common Pleas, that since this general rule, the rule to reply, &c. must now in all cases be served. *Pound v. Lewis*, 2 Dowl. 744. And therefore it is unnecessary to serve any separate demand of replication.

The first of the above rules relates only to pleadings by

plaintiffs, and leaves the practice as to judgments against a defendant for not rejoining, &c. precisely as it was before. In the court of Queen's Bench and Exchequer, the practice was to serve the rule to rejoin, and if the party did not rejoin, &c. within four days inclusive, the plaintiff might sign judgment; no demand of a rejoinder was necessary. And such is still the practice. In the Common Pleas, formerly, the rule was entered, not served; but then a demand of a rejoinder, &c. must have been served. Now however (for the second rule above mentioned relates to pleadings of a defendant as well as of a plaintiff) the rule must be served, and it is not necessary that there should be any other demand of rejoinder, &c. So that the practice of all the courts is now the same, in this respect.

*Replication, &c.*] The replication or subsequent pleading is engrossed on plain paper; and, by R. G. H. 4 W. 4, r. 1, s. 1, must be delivered to the opposite attorney or agent, not filed. It must bear date on the day it is delivered, in the same manner as a plea. But a similiter need not be dated, whether pleaded by the party who ought to add it, *Edden v. Ward*, 9 Law J., 323, *qb.* See *Middleton v. Woods*, per Parke, B. *cont.*, or by the opposite party for him. *Shackel v. Ranger*, 3 Mees. & W. 409. If it conclude to the country, it need not be signed by counsel; R. G. H. 2 W. 4, s. 107; if with a verification, it must. It cannot be pleaded between the 10th of August and the 24th of October. 2 W. 4, c. 39, s. 11.

If time be required to reply, rejoin, &c. it may in general be obtained upon summons from a judge at chambers. See *Wenham v. Downes*, 1 Har. & W. 324.

After replying, &c. the court will under particular circumstances allow the replication, &c. to be withdrawn, see *Alder v. Chip*, 2 Burr. 755. *Lucas v. Turner*, 1 Cr. & M. 597, and usually in the like cases as those in which they will allow a defendant to withdraw a plea. See *ante*, p. 285, and see *Delegat v. Highley*, 4 Bing. N. C. 114.

*Judgment.*] If the plaintiff do not reply, surrejoin, &c. within the time here limited for that purpose, the defendant may sign judgment of *non pros*. Where the plea or rejoinder, &c. concludes to the country, so that the plaintiff can only reply or surrejoin the *similiter*, still he must do so, if it be demanded, otherwise the defendant will be entitled to his judgment of *non pros*. *Hollis v. Buckingham*, 3 D. & R. 1. *As to the omission of a similiter, see post, tit. "Amendment."* But where a plea of payment into court was pleaded to the whole declaration, and other special pleas as to parts of it, and

the plaintiff replied to the plea of payment that he accepted the money in satisfaction, the court held that judgment of *non pros* could not be signed for his not having replied to the other special pleas. *Coates v. Stevens*, 1 Gale, 75. See *Dorsdy v. Cook*, 4 B. & C. 135. Also if the defendant do not rejoin, rebut, &c. within the time here limited, the plaintiff may strike out the previous pleadings, and sign judgment by default, as for want of a plea. *Petrie v. Fitzroy*, 5 T. R. 152.

Where the plaintiff's replication concluded to the country, and, the defendant being under terms to rejoin gratis, the plaintiff merely demanded a rejoinder, and for want of a rejoinder signed judgment: the court set aside the judgment without costs, as the plaintiff might have added the similitur. *Wye v. Fisher*, 3 B. & P. 443. *Seaton v. Scale*, 1 Har. & W. 210.

## SECTION XVIII.

## Demurrer.

*The demurrer.*] By R. G. H. 4 W. 4, r. 2, s. 14, the form of a demurrer shall be as follows:—"The said defendant by — his attorney [or in person, 'or plaintiff'] says that the declaration [or plea, &c.] is not sufficient in law:" showing the special causes of demurrer, if any. And by R. G. H. 4 W. 4, r. 1, s. 2, "in the margin of every demurrer, before it is signed by counsel, some matter of law, intended to be argued, shall be stated; and if any demurrer shall be delivered, without such statement, or with a frivolous statement, it may be set aside as irregular by the court or a judge, and leave may be given to sign judgment as for want of a plea: provided that the party demurring, may at the time of argument insist upon any further matters of law, of which notice shall be given to the court in the usual way." This extends to special, as well as general demurrers; *Lindus v. Pound*, 2 Mees. & W. 240; and in a special demurrer, it has been holden sufficient to state in the margin of the demurrer, that the plea, &c. is "bad, for the causes specially assigned for demurrer." *Berridge v. Priestly*, 5 Dowl. 306. As to what shall be deemed a frivolous statement within the above rule, and what not, see *Neal v. Richardson*, 2 Dowl. 89. *Creswell v. Crisp*, Id. 635. *Tyndall v. Ulleshorne*, 3 Dowl. 2. *Kinnear v. Keane*, 3 Dowl. 154. *Lyons v. Cohen*, Id. 243. *Howorth v. Hubbersty*, Id. 455. *Ross v. Robeson*, Id. 799, 1 Gale, 102. *Underhill v. Hurney*, 2 Dowl. 495. *Undersell v. Fuller*, 1 Cr. M. & R. 900. *Knill v. Stockdale*, 6 Mees. & W. 478. *Deriemer v. Fenna*, 7 Id. 439. *Chevers v. Parkington*, 6 Dowl. 75. *Jackson v. Cawley*, Id. 388. *Delle-*



*vure v. Percer*, 9 *Id.* 244. *Pigeon v. Osborne*, *Id.* 511. *Hart v. Proudfoot*, 8 *Dowl.* 306. *Edwards v. Greenwood*, 8 *Law J.*, 245, *cp.* *Dalton v. M'Intyre*, 10 *Id.* 342, *ex.* A defect in this respect, will be no objection to the demurrer being argued; the only way in which the opposite party can avail himself of the objection, is by applying to set aside the demurrer; *Lacy v. Umbers*, 3 *Dowl.* 732. *Abbott v. Arlett*, 4 *Dowl.* 759; and this should be done before the party applying has taken any further step in the cause. *Norton v. Macintosh*, 7 *Dowl.* 529.

*Get your draft demurrer signed by counsel*; *R. E.* 18 C. 2, K. B.; *R. E.* 33 G. 3, C. P.; *engross it on plain paper, and deliver it to the attorney of the opposite party.* By *R. G. H.* 4 W. 4, r. 1, s. 1, "no demurrer, nor any pleading after declaration, shall in any case be filed with any officer of the court, but the same shall always be delivered between the parties."

If the plaintiff demur to a plea in bar or rejoinder, &c. "the defendant's attorney, or the defendant if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of such demurrer." *R. G. H.* 2 W. 4, s. 59.

*Joinder in demurrer.*] By *R. G. H.* 4 W. 4, r. 1, s. 3, "no rule for rejoinder in demurrer shall be required; but the party demurring may demand a joinder in demurrer, and the opposite party shall be bound, within four days after such demand, to deliver the same, otherwise judgment." Where upon a demurrer to a plea, the plaintiff, instead of demanding a joinder, added one himself, and made up and delivered the demurrer book: the court upon application set aside the joinder. *Billing v. Kightley*, 5 *Bing. N. C.* 629. *S. C. rem. nom. Mullins v. Cox*, 7 *Dowl.* 660. Where the defendant, after the time for joining in demurrer had expired, but before any judgment signed, obtained a rule nisi to set aside the proceedings, with a stay of proceedings in the mean time; upon the rule being afterwards discharged, the defendant on the same evening delivered a joinder in demurrer, but judgment had then been signed: the court upon application set aside the judgment, holding that the defendant had the whole of the day on which the rule was disposed of, to join in demurrer. *Vernon v. Hodgins*, 4 *Dowl.* 654. Nor will the court oblige the party, whose pleading is demurred to, to join in demurrer within the time in the above rule mentioned, however frivolous his pleading may be. *Hall v. Popplewell*, 5 *Mes. & W.* 341.

By *R. G. H.* 4 W. 4, r. 2, s. 14, "the form of a joinder in demurrer shall be as follows:—*The said plaintiff* [or *defendant*] *says, that the said declaration* [or *plea, &c.*] *is sufficient in law.*"

*Engross it on plain paper, and deliver it to the attorney of the*

*opposite party. Vide supra.* It need not be signed by counsel. *R. G. H. 4 W. 4, r. 1, s. 4.*

By *R. G. H. 2 W. 4, s. 59*, "in all cases where the defendant demurs to the plaintiff's declaration, replication or other subsequent pleading, the defendant's attorney, or the defendant if he plead in person, shall be obliged to accept notice of executing a writ of inquiry, on the back of the joinder in demurrer."

*Demurrer book.*] By *R. G. H. 4 W. 4, r. 1, s. 5*, "the issue or demurrer book shall on all occasions be made up by the suitor, his attorney or agent, and not as heretofore by any officer of the court." It is engrossed on plain paper, usually by the plaintiff's attorney, and delivered to the attorney of the opposite party. In form it is the same as an issue in fact, as far as the entry of the pleadings; *see post*, title "*Issue*," except that in the Common Pleas, in cases where there is a demurrer to part only of a declaration or other pleadings, "those parts only of the pleadings, to which such demurrer relates, shall be copied into the demurrer books; and if any other parts shall be copied therein, the prothonotary shall not allow the costs thereof on taxation, either as between party and party, or attorney and client. *R. H. 8 & 9 G. 4, C. P.* The demurrer and joinder are then copied, each in a separate paragraph, which completes the demurrer book; an entry of *curia advisari vult* is no longer necessary. *R. G. H. 4 W. 4, r. 2, s. 2.*

*Argument, &c.*] No motion for a concilium is now required; but the demurrer may be set down for argument, at the request of either party, with the clerk of the rules at the master's office, upon payment of a fee of 1s. "and notice thereof shall be given forthwith by such party to the opposite party." *R. G. H. 4 W. 4, r. 1, s. 6.* Where a defendant demurred, and the plaintiff set down the demurrer for argument, but did not give notice of it or deliver a demurrer book to the defendant; and the latter, seeing the demurrer in the paper, came prepared to argue it, and then it was found that the pleadings were incomplete, as the plaintiff had not joined in demurrer: upon an application by the defendant for costs, the court refused them, saying that the defendant could not be misled by seeing the case in the paper, for as there was no joinder in demurrer, he must have known that it could not be argued. *Houworth v. Hubbersty*, 3 Dowl. 457. Where a defendant, two days before the end of the term, demurred to the declaration, for the purpose of gaining time, the court of Exchequer allowed the demurrer to be set down for argument on the last day of the term, and refused to allow the defendant to withdraw the demurrer and plead the general issue. *Wilson v. Tucker*, 1 Cr.

& M. 795. *Cooper v. Hawkes*, 1 *Crompt. & J.* 219. In all other cases, however, notice of the case being set down for argument, must be given in sufficient time, to enable the opposite party to prepare and deliver his demurrer books. See *Britten v. Britten*, 2 *Dowl.* 239. Where a defendant, after demurring, became bankrupt, and his assignees refused to defend, and the plaintiff thereupon applied to have the cause struck out of the paper; the court refused it, saying that the application was not warranted by any authority. *Flight v. Glossop*, 4 *Dowl.* 135.

Four copies of the demurrer book must next be made out, two by the plaintiff, two by the defendant; and each party, in the margin of his demurrer books, shall state the points he intends to insist upon in argument, *R. H.* 38 *G.* 3, *K. B.* *R. T.* 11 *G.* 4, *C. P.*, and not only those arising from the pleading demurred to, but the objections to any previous pleading also. See *Brooks v. Humphries*, 8 *Law J.*, 34, *cp. Parker v. Riley*, 3 *Mees. & W.* 230. And "four clear days before the day appointed for argument," the plaintiff shall deliver copies of the demurrer book to the chief, and to the senior judge, and the defendant to the other two judges next in seniority; "and in default thereof by either party, the other party may, on the day following, deliver such copies as ought to have been so delivered by the party making default: and the party making default shall not be heard, until he shall have paid for such copies or deposited with the officer a sufficient sum to pay for such copies." *R. G. H.* 4 *W.* 4, *r. 1, s. 6.* See *Darker v. Darker*, 2 *Dowl.* 88. If default be made by either party, so that all the books are not delivered, the demurrer, when called on for argument, will be struck out of the paper; *Abraham v. Cook*, 3 *Dowl.* 215, but see *Somers v. Miller*, 2 *Har. & W.* 117. *Scott v. Robson*, 2 *Cr. M. & R.* 29; and in order to prevent this, the party wishing to have the demurrer argued, should take care to ascertain whether the other party has delivered books; and if not, he should deliver them for him. And in order to charge the party with the costs of the copies so delivered, *Littledale, J.* held that these copies should be delivered on the day following the default, according to the terms of the rule; *Fisher v. Snow*, 3 *Dowl.* 27; and in another case, *Ld. Denman, C. J.* held that where a party furnishes all the books, he cannot object to the other party arguing the demurrer without payment of the costs of the two books, unless he have given him due previous notice of his intention to make such objection. *Sandall v. Bennett*, 4 *Nev. & M.* 89. Each party also, besides delivering copies of his paper books to two of the judges, must also furnish the clerks of the other two judges with copies of the points intended for argument which are marked in the margin of his demurrer books. This is required by an express rule in the Common Pleas; *R. T.*

11 G. 4; and is required by the practice of the other two courts. This rule also requires each party to leave at the chambers of the chief justice a copy of such points, to be delivered to the adverse party; and in the other courts, upon application to any of the judges' clerks, each party may be furnished with a copy of the other's points. And such copy should be obtained if practicable, by each party, before he instructs counsel to argue the demurrer.

The days for argument in the Queen's Bench are Tuesdays and Fridays; in the Common Pleas, the days appointed for the sittings in London and Middlesex, not being within the first four days, or the last week, of term. When the demurrer is called on, it is argued, first by the party demurring, then by the other party, and lastly by the party demurring in reply. The court then deliver their judgment.

If the plaintiff obtain judgment, it is a final judgment in debt, interlocutory in all other cases. If the issue on the demurrer be the only issue in the cause, then in debt the plaintiff may tax his costs and sue out execution; but in other cases, where the judgment is merely interlocutory, the plaintiff will have to sue out and execute a writ of inquiry, or, if the action be upon a bill of exchange, promissory note, or the like, he may have it referred to the master to compute the principal and interest in the ordinary way. But if besides the demurrer, there be also an issue in fact, it is in the plaintiff's option, whether he will argue the demurrer before or after the trial of the issue in fact. *Duberley v. Page*, 2 T. R. 394, but see *Burdett v. Colman*, 13 East, 27. If the issue in fact be tried first, the jury who try it, also at the same time assess contingent damages upon the issue in law, the venire in that case being awarded *tam ad triandum quam ad inquirendum*; see the forms, in the Appendix; so if the demurrer be argued first, the jury who afterwards try the issue in fact, assess also the plaintiff's damages on the issue in law: see the forms, in the Appendix. See *Saund.* 109 a. 2. *Id.* 300 n. and see *Thompson v. Perceval*, 2 B. & Ad. 967.

If the defendant obtain judgment, and there be no other issue but the issue in law, he may tax his costs, and sue out execution for them in the ordinary way; but not so, if there be other issues on the record undisposed of. *Forbes v. Gregory*, 1 Cr. & M. 435. And where a defendant pleaded two pleas, each to the whole cause of action, and one of them being demurred to, was holden good, and the defendant had judgment upon it: the court, upon application, allowed him to strike out the other plea, upon payment of costs of that issue. *Young v. Beck*, 3 Dowd. 804.

The party succeeding upon a demurrer is entitled to costs. 3 & 4 W. 4, c. 42, s. 34.

## SECTION XIX.

## The Issue.

The issue must be made up, "by the suitor, his attorney or agent, and not as heretofore by any officer of the court." *R. G. M. 4 W. 4, r. 1, s. 5.* It is made up by the plaintiff in ordinary cases; but it may be made up by the defendant, where there is to be a trial by proviso; and it may be made up by either plaintiff or defendant, in replevin, prohibition, or *quare impedit*.

If the defendant's pleading conclude to the country, the plaintiff may immediately make up the issue, adding the *similiter*; or, if the defendant's pleading conclude with a verification, and the plaintiff traverse it, concluding his replication, &c. of course to the country, he may, instead of delivering his pleading to the defendant's attorney, at once make up the issue, entering his replication, &c. in it, and adding the *similiter*. See *R. G. H. 2 W. 4, s. 108.* As to the effect of omitting the *similiter*, see *post*, tit. "*Amendment*." *Swaine v. Lewis*, 3 Dowl. 700.

The form of the issue will be found in the Appendix. It must show the dates of the different pleadings. *Ball v. Hamlet*, 1 Cr. M. & R. 575. And after setting out also the pleadings themselves in their order, it concludes with an award of the venire, that is to say, by commanding the sheriff "*that he cause to come here, on the — day of —, twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c.*" If, however, there be an issue of law joined, as well as an issue of fact, the award of the venire must be, as well to assess damages on the issue in law, as to try the issue in fact, otherwise it will be irregular, even although the latter issue go to the whole cause of action. *Codrington v. Lloyd*, 8 Ad. & El. 449, and see 2 Saund. 300, n. *Thompson v. Percival*, 2 B. & Ad. 967. See the form, where the issues in fact are to be tried first, in the Appendix; or where the demurrer is to be first argued, *Id.*; or where there are some issues to be tried by the country, some by the record, *Id.* Sometimes it becomes necessary to enter suggestions upon the issue, in order that they may appear upon the record of *nisi prius*, and upon the roll when made up. For where a proceeding, which must appear upon the record, is warranted by law, not generally, but only under particular circumstances, those circumstances must be stated and explained, to show the legality of the proceeding, otherwise it would appear irregular, and probably erroneous. Such explanation is entered in the form of a suggestion upon the issue, if it occur before the delivery of the issue, or upon the record, if it occur afterwards; after which

the subsequent proceedings will appear regular and warranted by law. For instance, if the sheriff be interested, the *venire* must be awarded to the coroners; see the form in the Appendix; if both sheriff and coroners be interested, it must be awarded to elisors. See *The Mayor of Norwich v. Gill*, 8 Bing. 27, and see the Form in the Appendix. So, if the court or a judge, upon application, order a local action to be tried in a different county from that in which the venue is laid, they "may order a suggestion to be entered on the record, that the trial may be more conveniently had, or writ of inquiry executed, in the county or place where the same is ordered to take place." 3 & 4 W. 4, c. 45, s. 22. See *Jones v. Price*, 7 Dowd. 103. *Doe v. Hickman*, 9 Id. 364. But in these cases, if the jury process were at once awarded on the roll to the coroner, or elisors, instead of the sheriff, without being preceded by a suggestion, showing that the sheriff or coroner was an interested party, or otherwise explaining the reason of it, it would be error. And the same if the *venire* were awarded to the sheriff of a different county from that in which the venue is laid. So, in debt on bond conditioned to perform covenants, &c. if in the course of pleading, a breach of the covenant, &c. be not alleged, it must be suggested; for otherwise, either the plaintiff would recover the whole amount of the penalty, which would be contrary to stat. 8 & 9 W. 3, c. 11, s. 8, which enacts that he shall only recover damages for the breach; or he would recover damages, without any thing appearing upon the record to warrant such a finding. See post p. 327, and see the form of the suggestion in the Appendix. So, where a plaintiff recovers only such a sum, as he might have sued the defendant for in a court of requests or court of conscience, if on the record it should appear that no costs were awarded to the plaintiff, or that costs were adjudged to the defendant, without explanation, it would be error, and hence the necessity of a suggestion in such a case. See post, tit. "Costs." So, where a statute gives double or treble costs, if it do not appear from the pleadings that the case is within the statute, the award of double or treble costs in such a case, if unexplained by way of suggestion, would be erroneous; and besides, the master would have no authority for taxing them. See post, tit. "Costs." So, where one of several plaintiffs or defendants dies in the course of a cause, and the action afterwards proceeds against the others, such proceeding would appear erroneous if the death were not previously suggested upon the record, so as to show it to be a case within the stat. 8 & 9 W. 3, c. 11, s. 7. See post, tit. "Death of Parties." See the form of the suggestion, before issue joined, in the Appendix; after issue joined. *Id.*

If there be a variance between the issue and the pleadings, or the issue and the *mise prius* record, either party may obtain a judge's order to have it amended at any time before trial.

And it has been holden not to be ground for setting aside a verdict, that the evidence at the trial, though it supported the record of *nisi prius*, would not have supported the issue delivered, where the variance between the record and the issue arose from a mistake in the issue. *Jones v. Tatham*, 8 *Tunst.* 634. So, where the issue in ejectment stated the premises to be in Wimbledon, and the *nisi prius* record correctly stated them to be in Himbleton, and a motion was made to set aside a verdict for plaintiff on this ground: the court refused the rule, as it did not appear how the place was named in the declaration, which possibly was correct. *Doe v. Wyld*, 2 *B. & A.* 472. If the issue be made up in wrong form, and the plaintiff upon application refuse to alter it, the court will oblige him to do so. *Hart v. Dally*, 2 *Dowl.* 257. So, if the issue state the writ to have issued on a wrong day, the defendant may have it amended by application to the court; and he should do so if the mistake be material to him, for the record is now conclusive evidence of the time of the commencement of the action. *Whipple v. Manley*, 5 *Dowl.* 100. Where the issue was not dated, the court granted a rule *nisi* to set it aside for irregularity. *Bail v. Hamlet*, 3 *Dowl.* 188. And where it omitted the dates of the pleadings, the court set aside a verdict for the plaintiff, and ordered a new trial, although the roll contained the dates. *Worthington v. Wigley*, 5 *Dowl.* 209.

On the back of the issue is usually indorsed the notice of trial. See "*Notice of Trial*," *post*.

*When and how entered.*] The entry of the issue upon the roll is now necessary only when the plaintiff is going to carry in his record, or is ruled to do so. By R. G. H. 2 *W. 4*, s. 70, "no entry of the issue shall be deemed necessary to entitle a defendant to move for judgment as in case of a nonsuit, or to take the cause down to trial by proviso;" as was formerly required. And by R. G. H. 4 *W. 4*, s. 15, "the entry of proceedings on the record for trial, and on the judgment roll, (according to the nature of the case) shall be taken to be, and shall be in fact, the first entry of the proceedings in the cause, or of any part thereof, upon record; and no fees shall be paid in respect of any prior entry made, or supposed to be made, on any roll or record whatever." This latter rule has had the effect of abolishing the practice of requiring the mere issue to be entered in any case. *Hodges v. Diley*, 7 *Dowl.* 555. But when the judgment roll is made up, the issue, as part of the proceedings, is entered on the roll verbatim, the declaration in one paragraph, and each of the other pleadings in a separate paragraph; each being entered "under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the court or a judge." R. G. H. 4 *W. 4*, r. 2, s. 1. And "no entry of continuances, by way of

impariance, *curia advisari vult*, *vicecomes non misit breve*, or otherwise, shall be made on any record or roll whatever, or in the pleadings, except the *jurata ponitur in respectu*, which is to be retained." *Id.* s. 2. Also, warrants to sue or defend, are no longer either filed or entered upon the roll. *R. G. H. 2 W. 4, s. 1. R. G. H. 4 W. 4, r. 2, s. 4.*

*Issue on a writ of trial.]* The form of the issue in this case is the same as in ordinary cases, to the joinder of issue inclusive; the conclusion, commanding the sheriff to summon a jury, and proceed to try the issue, will be found in the Appendix.

If the issue, instead of concluding thus, conclude with an award of a *venire*, as in ordinary cases, it may be set aside for irregularity. *Peel v. Ward*, 5 *Dowl.* 169. And the same, if there be any material variance between the issue delivered and the writ of trial. But the court will in general allow the issue to be amended on payment of costs. *Watts v. Ball*, 1 *Man. & Gr.* 208. *Atwill v. Baker*, 2 *Mees. & W.* 272.

*Delivery of the issue.]* The issue is delivered to the attorney of the opposite party, or in country causes to the town agent. Or it is delivered to the party himself, if he appear in person. When the issue is delivered to the defendant's attorney, &c., he cannot strike out the defendant's plea, and plead *de novo* without the leave of the court or a judge; *R. G. H. 2 W. 4, s. 46*; but he may strike out any *similiter* which the plaintiff may have added for him, and demur to the plaintiff's last pleading, if he will.

## SECTION XX.

### *Breaches in debt on bond.*

At common law, the judgment for plaintiff, in debt on bond, was, in all cases, that he should recover his debt. In cases where the bond was conditioned, not for the payment of money, but for the doing of some collateral act, such as the performance of covenants in another deed, or the like, this practice was often very inconvenient, sometimes very unjust. To remedy this, by stat. 8 & 9 *W. 3, c. 11, s. 8*, in actions on bond, or any penal sum, for non-performance of any covenants or agreements contained in any deed or writing, the plaintiff shall assign breaches, and the jury shall assess damages for the same. See *Roles v. Rosewell*, 5 *T. R.* 538. 1 *Saund.* 58. 2 *Saund.* 187, a. It is immaterial whether the agreement, &c. be contained in the condition of the bond, or some other instrument. *Collins v. Collins*, 2 *Burr.* 824. It extends to an annuity bond; *Id. Walcot v. Goulding*, 8 *T. R.* 126; to a



bond conditioned to perform an award; *Welch v. Irwin*, 6 East, 613; or to pay money by instalments; *Willoughby v. Swinton*, 6 East, 550; or to perform any covenant or agreement in any other deed or instrument. See *Hurst v. Jennings*, 5 B. & C. 650. But it does not extend to a warrant of attorney to secure an annuity; *Shaw v. Marquis of Worcester*, 6 Bing. 585; nor to a *post obit* bond; *Murray v. Earl Stair*, 2 B. & C. 82; nor to bail bonds; *Selby v. Lewes*, 1 Tidd. 633; nor to replevin bonds; *Middleton v. Brien*, 3 M. & S. 155; nor to bonds conditioned for the payment of any gross sum of money. See *James v. Thomas*, 2 Nev. & M. 663.

If the breaches are assigned in the declaration, the defendant may take issue upon them, and the subsequent proceedings are then the same as in ordinary cases. See *Quin v. King*, 1 Mees. & W. 42. But if the declaration be as on a common money bond, and the plaintiff have judgment on demurrer, or the defendant allow judgment to go by default, 8 & 9 W. 3, c. 11, s. 8, or plead non est factum, *Ethersey v. Jackson*, 8 T. R. 255, or non est factum, and fraud and covin, *Hornfray v. Rigby*, 5 M. & S. 60, or the like, the breaches must in that case be suggested upon the roll, and a copy delivered to the defendant; but the defendant is not allowed to answer to them. If, however, the defendant set out the conditions of the bond on oyer, and plead performance, and the plaintiff assign breaches in his replication, the venire may be awarded, and all the other proceedings had, as in ordinary cases. *Scott v. Staley*, 4 Bing. N. C. 724. In any of these cases, the court will not restrain the plaintiff from suggesting or assigning as many breaches as he pleases. *Archbishop of Canterbury v. Robertson*, 1 Cr. & M. 181.

The judgment is still entered up for the debt, and is to stand as a security for any further breaches; and if afterwards there be breaches, the plaintiff may have a *scire facias* on the judgment, and suggest them, and damages shall thereupon be assessed by writ of inquiry. 8 & 9 W. 3, c. 11, s. 8. Formerly the writ of inquiry in this case, as also where the plaintiff had judgment on demurrer or by default, must have been executed before the judge at *nisi prius*; *Id.*; but it must now be executed before the sheriff, and directed to him. 3 & 4 W. 4, c. 44, s. 16.

#### SECTION XXI.

##### Notice of trial.

*In what cases.*] Wherever a cause is to be tried by jury, notice of trial must be given. Even where a plaintiff gives a peremptory undertaking to try at a particular sittings or assizes, he must also give a notice of trial. *Monk v. Wade*, 8 T. R.

246, n. *Ifield v. Weeks*, 1 H. Bl. 222. *Sulsh v. Cranbrook*, 1 Dowl. 148. So where a trial is put off to another term by rule of court, the plaintiff must still give notice of trial; *Jacks v. Mayer*, 8 T. R. 245; and the same, even where the trial is fixed for a certain day. *Ellis v. Trusler*, 2 W. Bl. 798. So, if the plaintiff give notice of trial, and do not proceed upon it, he cannot proceed to trial at another assizes or sittings without a new notice. R. M. 1654, s. 18. So, if the record be made a remanet at the assizes, the plaintiff cannot afterwards proceed to trial without giving a new notice of trial; *Gains v. Bilson*, 4 Bing. 414: if made a remanet from one sittings to another, in London or Middlesex, a new notice is not necessary. *Shepherd v. Butler*, 1 D. & R. 15. *Per Cur. in Jacks v. Mayer*, 8 T. R. 245. If the trial be had, without giving notice to the defendant, and the plaintiff obtain a verdict, the court will set it aside for irregularity, without requiring from the defendant any affidavit of merits. *Williams v. Williams*, 2 Dowl. 350.

*What notice.*] In country causes, ten days' notice of trial must be given; 14 G. 2, c. 17, s. 4; one day inclusive, the other exclusive; as a notice on the 9th, for the 19th. *Legge v. Williams*, 2 Tidd. 815.

In town causes, if the defendant reside within forty miles of London, an eight days' notice of trial is sufficient. R. M. 1654, s. 21, C. P.; R. M. 4 A. (c); but if he reside more than forty miles from London, he must have fourteen days' notice of trial. R. M. 4 A. (c). *Brind v. Torris*, 2 W. Bl. 1205. See 14 G. 2, c. 17, s. 4. Therefore if the defendant reside abroad, he must have fourteen days' notice of trial. *Douglas v. Ray*, 4 T. R. 552. And although he reside in London at the commencement of the action, yet if he remove permanently to a distance above forty miles from London, he will be entitled to fourteen days' notice, *Spencer v. Hall*, 1 East, 688, and see *Lenham v. Gould*, 4 Dowl. 371, provided he give the plaintiff timely notice of his change of residence. *Rochfort v. Robertson*, 12 East, 427. And where the defendant was master of a coasting vessel, and had no regular residence on shore, it was holden that he was to be considered as belonging to the port to which his ship belonged; and that being above forty miles from town, that he was entitled to fourteen days' notice, although he was in London at the time the notice was served. *Blaaw v. Chaters*, 6 Taunt. 458. But where there are two or more defendants, if any one of them reside within forty miles of London, eight days' notice of trial will be sufficient. *Per Ashurst, J. Perry v. Jackson*, 4 T. R. 520.

If however in the Queen's Bench or Common Pleas, the notice be for the adjournment day in London, four days' notice before the first day of the sittings after term, shall be suffi-

cient, if the defendant reside within forty miles of London, and eight days' notice, if he reside above that distance; *R. E. 51 G. 3, K. B.*; *R. H. 32 G. 3, C. P.*; and every notice of trial for the sittings after term in London, shall specify whether it is intended to try the cause on the first day of the sittings, or at the adjournment day. *Id.* But in the Exchequer, both in Middlesex and London, the notice for the sittings after term must be given eight or fourteen days before the time appointed for the trial, as in ordinary cases in town causes. *R. E. 37 G. 3, Ex.*

It may be necessary to mention, that the days between the Thursday before Easter day, and the Wednesday after, are reckoned in notices of trial and notices of inquiry, although not in other proceedings. *R. G. E. 2 W. 4, r. 1.*

Where the notice given is insufficient, if the defendant appears at the trial and defend the action, he will thereby waive the irregularity. *Doe v. Jessop, 3 B. & Ad. 402.*

*Short notice.*] In country causes, short notice of trial means a four days' notice. *R. G. H. 2 W. 4, s. 58.* And if from circumstances there be not four days remaining before the commission day, when the pleadings are completed, you cannot regularly give notice of trial for those assizes. *Lawson v. Robinson, 1 Cr. & M. 499.* In town causes, a two days' notice seems sufficient; *Pract. Reg. 390*; but it will be prudent to give as much more as is practicable. A defendant, under terms to take short notice of trial, is not bound to take short notice of inquiry; *Blaau v. Chaters, 6 Taunt. 458*; or if under terms to take short notice for the sittings in term, he is not bound to take it for the sittings after term; *Isaacs v. Windsor, 2 Tidd. 817*; or if under terms to take such notice for the sittings after term, he is not bound to take it for the adjourned sittings; *Abbott v. Abbott, 7 Taunt. 452*; or if under terms to take short notice of trial for the sittings "in or after" a certain term, he is not bound to take it for the sittings in or after any other term; *Slatter v. Painter, 10 Law J., 476, ex.*; or although under terms to take short notice of trial, yet he is not thereby obliged to receive less than a full notice of countermand. *King v. Jones, 1 Cr. & M. 71.*

*Notice of trial by continuance.*] In town causes, where notice of trial has been given for a sittings in term, it may be continued to the next sittings by another notice. *R. M. 1654, s. 21, C. P.* If the defendant reside within forty miles of London, this must be given two days at least before the sittings at which the cause was to be tried, as Thursday for Saturday, Friday for Monday, *Stewart v. Abraham, 2 Dowl. 709*, Saturday for Tuesday, (Sunday not being reckoned); *Wardle v. Ackland, 2 Dowl. 28*; but if the defendant reside

more than forty miles, it must be given six days before the sittings. *Forbes v. Crow*, 1 *Mees. & W.* 465. If the first notice be bad, the notice by continuance will be bad also; but if in that case the notice by continuance be given such a time before the second sittings as would be sufficient for a new notice of trial, the court will hold it good as a new notice. *Tyte v. Steventon*, 2 *W. Bl.* 1298. If on the other hand, the first notice be good, and it be continued once, the plaintiff cannot continue it a second time, even although the first notice of continuance were given as long before the sittings as is required for a notice of trial; *Wyatt v. Stocken*, 6 *Ad. & El.* 803; the general rule being that a notice of trial by continuance can be given but once.

*When, where, and how given.*] As to when notice of trial must be given, *see post*, *tit.* "Judgment as in case of nonsuit." The plaintiff may either indorse it on the back of the issue, or may give it on a separate paper; and indeed he may deliver it at the time he delivers any replication or subsequent pleading concluding to the country. *R. G. H. 2 W. 4, s. 59*. Where one notice was indorsed on the issue, and another for a different day given on a separate paper, it was holden irregular. *Kerry v. Reynolds*, 2 *Cr. M. & R.* 310. *See Fell v. Tyne*, 5 *Dowl.* 246. It must in all cases be given to the attorney or agent in town. *R. G. H. 2 W. 4, s. 57*. Where it was put through the door of the defendant's office, (although at his own request), and there was no subsequent acknowledgment of its having come to his hands, Taunton, J. held it bad, and set aside the verdict. *Fry v. Mann*, 1 *Dowl.* 419.

The notice of trial in Middlesex, may be in this form: *Take notice of trial in this cause for the [first] sittings within [or the sittings after] this present term to be holden in the court at Westminster in the county of Middlesex.*

For London, thus: *Take notice of trial in this cause for the — sittings within [or for the sittings after, or for the adjournment day after] this present term, to be holden at the Guildhall of the city of London.*

For the Assizes thus: *Take notice of trial in this cause, for the next assizes to be holden at [the Castle of York] in and for the county of [York].*

If any of these notices be given on a separate paper, it should be intituled in the court and cause, signed in the name of the plaintiff's attorney or agent, and directed to the defendant's attorney or agent, or to the defendant if he defend in person. Care must be taken that it describe correctly where the trial is to be had, &c. *See Cross v. Long*, 1 *Dowl.* 342.

*Notice of countermand.*] If the plaintiff be not prepared to proceed to trial at the sittings or assizes for which he has

given notice, he may countermand his notice of trial. In country cases, and in town cases where the defendant resides more than forty miles from town, the notice of countermand must be served six days before the time mentioned in the notice of trial, unless short notice have been given. *R. G. H. 2 W. 4, s. 61. 14 G. 2, c. 17, s. 5.* But in town causes, where the defendant resides within that distance, two days' notice of countermand shall be deemed sufficient. *Id. s. 62.* See *King v. Jones, ante*, p. 330. Where the sittings day was nominally the 12th of May, but that was merely for the purpose of adjourning to the 16th, still the court held that the notice should have been given the required number of days before the 12th. *Cooper v. Whitmarsh, 4 Mees. & W. 73.* In country causes, it may be given either in town or country, unless otherwise ordered by the court or a judge; *Id. R. G. H. 2 W. 4, s. 57;* and the country attorney may give it, although his London agent be the attorney on the record. *Cheslyn v. Pearce, 1 Mees. & W. 56.* It must in all cases however be given to the defendant's attorney, if he defend by attorney, and not to the defendant himself. *Margetson v. Rush, 9 Law J., 172, ex.*

The form of the notice of countermand, may be thus: *Take notice that I hereby countermand the notice of trial given you in this cause. Dated the — day of — 18 —.* To be intituled in the court and cause, and signed and directed, as notices in ordinary cases.

## SECTION XXII.

*Nolle prosequi.*

A *nolle prosequi* is a partial forbearance by the plaintiff to proceed further, either as to some of the defendants, or as to part of the suit; but he is still at liberty to go on, as to the rest. *1 Saund. 207, c.*

In actions *ex delicto* against two or more defendants, if the plaintiff for any reason wish not to proceed against some one of them, he may enter a *nolle prosequi* as to him, and proceed against the others. *Dale v. Eyre, 1 Wils. 360. 1 Saund. 207, note.* In actions *ex contractu* against two or more, if the defendants join in their pleas, the plaintiff cannot enter a *nolle prosequi* as to any one of them; *1 Saund. 207, a, b;* but if they plead severally, and one plead a plea which goes to his personal discharge, and not to the action of the writ, such as bankruptcy, *ne unques executor*, &c., the plaintiff may enter a *nolle prosequi* as to that one, *1 Saund. 207, b. Noke v. Ingham, 1 Wils. 89,* and proceed against the others. *Moravia v. Hunter, 2 M. & S. 444.*

So the plaintiff may enter a *nolle prosequi* as to part of a suit: as where the defendant pleads the general issue to part of the declaration, and pleads a justification or demurs to the residue, the plaintiff may enter a *nolle prosequi* as to that part of the declaration which is covered by either of the pleas. 1 *Saund.* 207, b. *Bertram v. Gordon*, 6 *Taunt.* 444. See *Amor v. Cuthbert*, 10 *Law J.*, 274, cp. So where there are several counts, and the defendant demurs to one, and pleads to the rest, if the plaintiff have judgment on demurrer as to the one count, he may enter a *nolle prosequi* as to the rest, and proceed to have his damages assessed on the count on which he had judgment; and he may have his damages assessed, even before he has actually entered the *nolle prosequi*. *Fleming v. Langton*, *Str.* 532. *Duperoy v. Johnson*, 7 *T. R.* 473. If however there be a demurrer to a declaration for a misjoinder of counts, the plaintiff cannot cure the defect by entering a *nolle prosequi* as to one of the counts. *Drummond v. Dorant*, 4 *T. R.* 360. *Rose v. Bowler*, 1 *H. Bl.* 108.

In actions *ex delicto*, as trespass, &c., the plaintiff may enter a *nolle prosequi* as to part of a count, and proceed upon the residue. 1 *Saund.* 207, c.

Where in trover against several defendants, one of them, J.S., was told by the plaintiff that no evidence would be offered against him, as he wanted him as a witness; in consequence of which J. S. did not prepare for his defence, but attended the trial, expecting to be called as a witness: the plaintiff however having proceeded at the trial against J. S., as well as the other defendants, and obtained a verdict against all, the court upon application ordered him to enter a *nolle prosequi* as to J. S. *Bloomfield v. Blake et al.*, 2 *Dowl.* 237.

As to costs: by stat. 3 & 4 W. 4, c. 42, s. 32, where several persons shall be made defendants in any personal actions, and any one or more of them shall have a *nolle prosequi* entered as to him or them, every such person shall have judgment for and recover his reasonable costs. And by sect. 33, where any *nolle prosequi* shall have been entered upon any count, or as to part of any declaration, the defendant shall be entitled to have judgment for, and recover his reasonable costs in that behalf. And where a defendant paid money into court as to part of the demand, and as to the residue of the monies mentioned in the declaration pleaded several pleas of payment and a plea of set-off; and the plaintiff entered a *nolle prosequi* as to the sums covered by these pleas, and took the money out of court; the court held that the defendant was entitled to costs, under this latter section, as to all the pleas except that of payment of the money into court. *Trower et al. v. Chadwick*, 3 *Bing. N. C.* 334.

A *nolle prosequi* as to part, entered up after a judgment for the whole, is equivalent to a *retraxit*, and a bar to any

future action for the same cause. *Bourden v. Horne*, 7 Bing. 716.

## SECTION XXIII.

*Cognovits and Warrants of Attorney.*

*Cognovit.*] A cognovit is a confession of an action in writing, with or without terms or conditions annexed to it. The action of course must be commenced before a cognovit can be given; but it may be given before declaration, *Webb v. Aspinall*, 7 Taunt. 701. *Morley v. Hall*, 2 Dowl. 404. *Clarke v. Jones*, 3 Dowl. 277, or at any time after process is sued out, and even before it is served or executed, *Kirbey v. Jenkins*, 2 Tyr. 499, and although more than four months have elapsed from the time of its teste. *Richardson v. Daly et al.*, 4 Mees. & W. 384. A writ, however, must be sued out, to warrant a plaintiff in taking a cognovit. But where it was objected that a cognovit was taken from a prisoner, to secure the debt for which he was then in execution, the court held that there was no objection to that, if a writ had been sued out; and as the defendant did not show that no writ had been sued out, they discharged a rule to set aside the cognovit. *Shanley v. Colwell*, 6 Mees. & W. 543. If it be given after the defendant has pleaded, he must agree in it also, to withdraw the plea. If the action be against two or more persons, the cognovit should be signed by all, to warrant a judgment against them. See *Rathbone v. Drakeford*, 6 Bing. 375. If it contain any matter of agreement of £20 value, it must be stamped as an agreement. *Pitman v. Humphrey*, 2 Tyr. 500. *Reardon v. Swaby*, 4 East, 188. See *Ames v. Hill*, 2 B. & P. 150. *Jay v. Warren*, 1 Car. & P. 532. *Green v. Gray*, 1 Dowl. 350. *Morley v. Hall*, 2 Dowl. 494. But there is little use in making an objection on this ground; for if the plaintiff get the cognovit stamped at any time before he shows cause against the rule, and which of course he may do upon payment of the penalty, it will be deemed sufficient, and the rule will consequently be discharged. *Clarke v. Jones*, 3 Dowl. 277. *Ross v. Tomlinson*, *Id.* 40.

A cognovit usually contains an agreement by the defendant not to bring a writ of error, &c.; and if he afterwards bring a writ of error, it shall be no supersedeas of execution. *Best v. Gompertz*, 2 Cr. & M. 427.

*Warrant of attorney.*] A warrant of attorney is a written authority to one or more attornies, to appear for the party executing it in some court, and there to receive a declaration at the suit of the party to whom the warrant is given, and to confess the same, or to suffer judgment to pass against him by

*nil dicit* or otherwise. It also contains an authority to the attorney to execute a release of errors; and on this account it is, that a warrant of attorney must be under seal, because an authority or power of attorney to execute a deed, such as a release, must be by deed. As a warrant of attorney to confess judgment, it is true, it need not be by deed; *Kinnersley v. Mussen*, 5 *Taunt.* 264; but as a power of attorney to execute a release of errors, it must. And if after executing such authority, the party were to bring a writ of error upon the judgment to be entered up in pursuance of the warrant, or on any judgment in *scire facias* thereon, the court upon application would set it aside, *Baddely v. Shafto*, 8 *Taunt.* 434.

The warrant of attorney is usually subject to a defeazance, stating certain terms, upon the performance of which judgment is not to be entered up, or execution issued. This defeazance, in practice, is usually written on the same paper as the warrant of attorney; and by several rules of court, (R. M. 42 G. 3, K. B.; R. M. 43 G. 3, C. P.; R. M. 43 G. 3, Ex.), it is required to be so; but it has been holden that the effect of these rules is, merely to subject the attorney to censure, who draws a warrant of attorney and neglects to write the defeazance upon it, but the omission does not affect the validity of the warrant. *Shaw v. Evans*, 14 *East*, 576. *Portridge v. Fraser*, 7 *Taunt.* 307. There is one exception, however, to this, namely, that in order to render a warrant of attorney valid as against the assignees of the party giving it, if he should become bankrupt, (*Morris v. Millin*, 6 B. & C. 446. *Bennett v. Daniel*, 10 B. & C. 500), if it have been given subject to a defeazance, the defeazance must be written on the same paper or parchment on which the warrant of attorney is written, before the same or a copy thereof is filed, otherwise the warrant of attorney shall be void to all intents and purposes. 3 G. 4, c. 39, s. 4. The Insolvent Act (1 & 2 Vict. c. 110, s. 60), contains a similar provision. It was in one case ruled that a warrant of attorney was void, for omitting to state in the defeazance that certain collateral securities had been given at the same time with it; *Morell v. Dubost*, 3 *Taunt.* 235; but this has since been ruled otherwise. *Sansom v. Goode*, 2 B. & A. 568.

It is a common practice, in the defeazance, where no time is limited for entering up the judgment, and where of course it may be entered up instanter, to stipulate that execution may issue upon it, after a year and day have elapsed, without reviving it by *scire facias*; and there is no objection in point of law to such a stipulation. *Morris v. Jones*, 2 B. & C. 242. There is also no objection to a warrant to confess judgment generally of a term, although the judgment must, by R. G. T. 4 W. 4, s. 3, be entered as of a particular day. *Todd v. Gompertz*, 6 *Dowl.* 296.



*How executed.*] The warrant of attorney is sealed and executed like any other deed, for the reason already given, *ante*, p. 335; the defeazance, only signed. See the form of a warrant of attorney, in the Appendix; and of the defeazance, *Id.* Blank forms of the warrant, upon stamps, may be had at the stationers, which may readily be filled up; the defeazance of course is written, as it varies in different cases. There is an old rule in the court of Common Pleas, (*R. T. 14 & 15 G. 2*), which requires the warrant of attorney to be read over by the party, or by some person to him, before he executes it; but the rule has never been acted upon, and is deemed to be no longer in force. *Taylor v. Parkinson*, 2 H. Bl. 383.

A warrant of attorney, purporting to be given by three parties, but executed by two only, the third having refused, has been holden to be an incomplete instrument, and that it cannot be enforced. *Harris v. Wade*, 1 Chit. 322.

*How attested.*] Formerly, a warrant of attorney or cognovit, given by a prisoner in custody on meane process, must have been executed in the presence of his attorney, and be attested by him. This rule of practice is now no longer confined to the case of a prisoner, but is made general, by stat. 1 & 2 Vict. c. 110, s. 9; by which, after reciting that "it is expedient that provision should be made for giving every person executing a warrant of attorney to confess judgment, or a *cognovit actionem*, due information of the nature and effect thereof," it is enacted that from and after the 1st of October, 1838, no warrant of attorney to confess judgment in any personal action, or *cognovit actionem*, given by any person, shall be of any force, unless there shall be present some attorney of one of the superior courts on behalf of such person, expressly named by him and attending at his request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and *thereby* declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney."

The statute further enacts, that a warrant of attorney or cognovit, "not executed in manner aforesaid, shall not be rendered valid, by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same." *Id.* s. 10. But it has been holden that the statute does not apply to a case, where the party giving the cognovit or warrant of attorney, is himself an attorney; *Chipp v. Harris*, 5 Mees. & W. 430, 9 Law J., 64, *ex.*; nor will the court entertain an application by a third party to set aside a cognovit or warrant of attorney, for any defect in its attestation, although he be a creditor of the defendant, and interested in setting it aside. *Id.*

The statute requires, *first*, that an attorney shall be present on behalf of the defendant. But where, upon being informed that it was necessary that an attorney should be present to witness the execution, the defendant sent for a person, who on his arrival stated that he was the defendant's attorney, the court held it to be sufficient, although it turned out that he was uncertificated, and at the time a prisoner for debt. *Cox v. Cannon*, 4 Bing. N. C. 453; and see *Jeyes v. Booth*, 1 B. & P. 97.

Secondly, he must be expressly named by the defendant, and attending at his request. This means merely that the attorney shall be employed by the defendant, of his own voluntary act; it is not necessary that he shall be first named by him; if the name of an attorney, be suggested to the defendant by a third person, even by the plaintiff's attorney, *Taylor et al. v. Nichol*, 6 Mees. & W. 91. *Oliver v. Woodroffe*, 4 Mees. & W. 650. *Bligh et al. v. Brewer*, 1 Cr. M. & R. 651, or even by the plaintiff himself, *Haigh v. Frost et al.*, 7 Dowl. 743, and he adopt the suggestion, and employ the attorney for the particular purpose, this, in the absence of fraud, will be sufficient; but otherwise if the nomination is merely to be implied from the defendant's allowing such attorney to attest the instrument or the like, or if the defendant had no fair opportunity to exercise his discretion in the employment of him for the purpose. *Barnes v. Pendrey*, 7 Dowl. 747. *Gripper et al. v. Bristow*, 6 Mees. & W. 807. *Fisher v. Papanicholas*, 2 Cr. & M. 215. *White v. Cameron*, 6 Dowl. 476. But the plaintiff's attorney, *Mason v. Kiddle*, 5 Mees. & W. 513. *Todd v. Gompertz*, 6 Dowl. 296, or his agent, *Rice v. Linsted*, 7 Dowl. 153, although he be also the defendant's attorney, *Sanderson v. Westley et al.*, 6 Mees. & W. 98. *Rising v. Dolphin*, 8 Dowl. 309, will not be sufficient for this purpose.

Thirdly, his presence is required, to inform the defendant of the nature and effect of such warrant or cognovit. It is not necessary that he should read it to him. *Oliver v. Woodroffe*, 4 Mees. & W. 650. And even if (without collusion) he do not in fact inform the defendant of the nature or effect of the instrument, that will not affect its validity, *Haigh v. Frost et al.*, 7 Dowl. 743.

Fourthly, he must subscribe his name as a witness to the due execution of the instrument, and thereby (that is to say, in the attestation) declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney. It is not necessary to state in the attestation that he was named by the party, for the purpose of attesting the instrument. *Per Parke, B. Oliver v. Woodroffe*, 4 Mees. & W. 651. But he must in such attestation expressly declare that he is the attorney for the party; and that he subscribes as such; no merely verbal declaration to that effect will be suf-

ficent. *Petter v. Nicholson*, 8 *Mess. & W.* 294, 10 *Law J.*, 311, *ex.* And therefore where the attestation of a cognovit omitted to state that the attesting witness subscribed as such attorney, it was holden bad, and the cognovit set aside. *Id.* *Pool v. Hobbe*, 8 *Dowl.* 113. And the same, where the attestation omitted to state that he was attorney for the defendant, although it stated that he subscribed it as such. *See Elkington v. Holland*, 11 *Law J.*, 273, *ex.* Where after a warrant of attorney was regularly executed and attested, but being afterwards altered, the defendant again executed it by tracing his signature with a dry pen, and the attorney did the same with the attestation: the court held that this was not a compliance with the statute; there should have been a new attestation. *Bailey et al. v. Belamy et al.*, 9 *Dowl.* 507. 10 *Law J.*, 41, *qb.* The attestation may be in this form: "Signed, [sealed, and delivered] by the above named A. B., in the presence of me, E. F., one of the attornies of her Majesty's court of — at Westminster; and I hereby declare that I am attorney for the said A. B., and that I subscribe this attestation as such attorney."

It may be necessary to mention, that the statute upon this subject, (*ante*, p. 336), applies to cognovits in ejectments, *Doe v. Howell*, 12 *Ad. & El.* 696, but not to warrants of attorney. *Doe v. Kingston*, 11 *Law J.*, 73, *qb.*

*In what cases filed.*] Every warrant of attorney to confess judgment in a personal action, or a true copy thereof and of the attestation thereof, and the defazance and indorsements thereon, in case such warrant be to confess judgment in the court of King's Bench,—or such true copy in case the warrant be to confess judgment in any other court,—shall within twenty-one days after the execution thereof, be filed, together with an affidavit of the time of the execution thereof, with the clerk of the dockets and judgments in the said court of King's Bench; 3 *G. 4*, c. 39, s. 1; otherwise it shall be deemed fraudulent and void as against the assignees of the party, if he should afterwards become bankrupt. *Id.* s. 2.

So, every cognovit in a personal action, in case the action be in the court of King's Bench,—or a true copy of such cognovit, if the action be in any other court,—shall, together with an affidavit of the time of the execution thereof, be filed with the said clerk within twenty-one days, to render it, or any judgment or execution thereupon, valid as against the assignees of the defendant, if he should become bankrupt, *Id.* s. 3. *See Hurst v. Jennings*, 5 *B. & C.* 650. *Green v. Gray*, 1 *Dowl.* 350. There is a similar provision in the Insolvent Act, 1 & 2 *Vict.* c. 110, s. 60. The twenty-one days mentioned here, are reckoned one day inclusive the other exclusive; and therefore it was holden that a warrant of attorney executed on the 9th, might be filed on the 30th. *Williams v. Burgess*, 12

*Ad. & El.* 635, 10 *Law J.*, 10, *qb.* And it is not necessary that the petitioning creditor's debt should have accrued before the expiration of these twenty-one days; if at any time after, it will be sufficient. *Everett et al. v. Wells et al.*, 10 *Law J.*, 81, *cp.*, 9 *Dowl.* 424.

*Judgment on cognovit.*] The time of signing judgment must of course depend upon the terms of the cognovit. See *Perry v. Turner*, 2 *Tyr.* 128. Where by the terms of the cognovit, no judgment was to be signed or execution issued unless default should be made in payment of 2*5*l. and the costs by monthly instalments of 10*s.* each; and some of the instalments being unpaid, the plaintiff signed judgment and sued out execution for the whole: it was holden that he had a right to do so. *Rose v. Tomblinson*, 3 *Dowl.* 49. But where judgment was not to be entered up until default should be made in payment of the debt, with interest and costs, on the 9th November, was holden that such judgment could not be entered up, even after that time, until the plaintiff had first furnished the defendant with a bill of costs, and given him notice of taxation. *Booth v. Lady Hyde Parker*, 3 *Mees. & W.* 54. In a later case, however, under the like circumstances, it was holden sufficient to have the costs taxed at any time before execution. *Barrett v. Partington*, 5 *Bing. N. C.* 487. Where judgment was not to be entered up, until the final hearing of a chancery suit, it was holden that the plaintiff was not authorized to enter up judgment pending an appeal. *Jones v. Reynolds*, 3 *Nev. & M.* 465. The money may be paid to the plaintiff or his attorney; and if it be tendered to the plaintiff and he refuse it, any judgment signed afterwards by him or his attorney will be irregular, *Anon.* 1 *Dowl.* 173, unless a subsequent demand have been made and payment have been refused.

Formerly, if the defendant died before the time for signing judgment, yet if judgment could afterwards be signed so as to have relation to a time before the death, (as if the defendant died in term, and the judgment was signed at any time before the end of the following vacation), the judgment would be valid, and a *fi. fa.* might thereupon be sued out and executed, tested before the death. *Calvert v. Tomlin*, 5 *Bing.* 1. But as judgments have now relation, not to the first day of the term as formerly, but to the day on which they are actually signed (*R. G. H.* 4 *W.* 4, r. 2, s. 3), this can no longer be done. *Blackburn v. Godrick*, 9 *Dowl.* 337.

If by the terms of the cognovit the costs are to be taxed, they should be taxed before the judgment is signed. See *Wilson v. Northern*, 4 *Dowl.* 212, and see *Booth v. Lady Hyde Parker*, 3 *Mees. & W.* 54, *supra*. Then enter an appearance for the defendant; see *ante*, p. 115. *Davis v. Hughes*, 7 *T. R.* 206. See *Richardson v. Daly et al.*, 4 *Mees. & W.* 384; make

an incipitur of the declaration on plain paper (then termed the judgment paper), and an incipitur on a roll which you will get at the master's office; take these and the cognovit (see R. H. 2 & 3 G. 4) to the proper officer at the master's office, who will thereupon sign the judgment, and file the cognovit. But if a fixed sum for costs be stated in the cognovit, you sign your judgment first, then take the judgment paper, roll and cognovit to the master, who will tax the usual costs of signing judgment, and mark them on the judgment paper, (and it is not necessary to give notice of taxing these latter costs; *Griffiths v. Liversedge*, 2 Dowl. 143. *Clarke v. Jones*, 3 Dowl. 277. *Perry v. Turner*, 2 Tyr. 128); and lastly, take the cognovit, and file it with the officer who signed the judgment. If a plea have been pleaded, it must be withdrawn; and for this purpose the defendant or his attorney must attend with you before the master. Formerly this must have been done by the defendant's attorney or his clerk; but now, by R. G. H. 2 W. 4, s. 10, the defendant "may withdraw his plea in person, without the appearance of the attorney or his clerk for that purpose before the officer of the court." Having signed judgment, the plaintiff may immediately sue out execution, if he be not prevented from doing so by the terms of the cognovit.

*Judgment and execution on a warrant of attorney.*] If the warrant of attorney be without a defeazance, judgment may be entered up, and execution sued out immediately after the warrant of attorney is executed. If there be a defeazance, it depends upon the terms of it at what time judgment may be signed and execution sued out. Where the defeazance allowed the party to sign judgment as of the preceding term or any subsequent term, and he signed judgment in the vacation, and not as of the preceding term, the court held it to be irregular, and set it aside. *Corbold v. Chilver*, 11 Law J., 137, cp. Where it was to secure the payment of a sum of money on demand, it was holden that judgment could not be signed or execution sued out until after an actual demand had been made of the money. *Nicholl v. Bromley*, 2 Brod. & B. 464. *S. P. Capper v. Dando*, 1 Har. & W. 11. But where the sum was payable by instalments, and judgment was to be entered up immediately, but execution was not to issue until default made in payment of the said sum by instalments as aforesaid: the court held that upon non-payment of any one instalment, execution might be sued out for the whole. *Leveridge v. Forty*, 1 M. & S. 706. Where a warrant of attorney was given by two persons, and the party to whom it was given stipulated that he should not proceed hostilely against them unless he should conceive that there was danger of their failure: it was holden that he was at liberty to sue out execution, immediately upon the failure

of one of them. *Partridge v. Fraser*, 7 Taunt. 307. In this respect a fair and reasonable, not a forced construction must be given to the defeazance. See *Biddlecombe v. Bond*, 5 Nev. & M. 621. *Duke v. Watchorn*, 1 Dowl. N. C. 265.

In the case of a warrant of attorney, it is not necessary to suggest breaches, in the same cases in which breaches must be assigned in an action on a bond, *Kinnersley v. Mussen*, 5 Taunt. 264. *Cox v. Rodbard*, 3 Taunt. 74. *Shaw v. Marq. of Worcester*, 6 Bing. 385. And see *ante*, p. 327, even although a bond have been given, as well as the warrant of attorney. *Austerbury v. Morgan*, 2 Taunt. 195.

*The like, after death, &c.*] If a warrant of attorney be given to a man, without giving power to his executors, &c. to enter up judgment, if the man die, judgment cannot afterwards be entered up, *Wild v. Sands*, Str. 718. *Manvill v. Manvill*, 1 Dowl. 544, even although the defeazance name the executors, *Foster v. Clagget*, 6 Dowl. 524, or the warrant contain a release of errors to him, his executors, &c., *Short v. Coglein*, 1 Anst. 225. *Cowie v. Alloway*, 8 T. R. 257, or although the defeazance express that it is to secure the payment of money to him, his executors, &c. *Hinshall v. Matthews*, 7 Bing. 337. But where a warrant of attorney is given to two or more, if one die, the court upon application will allow judgment to be entered up at the suit of the survivor. *Futcher v. Smith*, 2 W. Bl. 1301. *Fendall v. May*, 2 M. & S. 76. *Todd v. Dodd*, 1 Wils. 312. *Harper v. Jackson*, 1 Har. & W. 214. *Johnson v. Jenkins*, 1 Dowl. 367. *Build v. Wightman*, Id. 545. *Hind et al. v. Kingston*, 6 Dowl. 523.

But if a warrant of attorney be given by two, and one of them die, the court will not allow judgment to be entered up against the survivor, under any circumstances. *Raw v. Alderson*, 7 Taunt. 453. *Gee v. Lane*, 15 East, 592. *Heath v. Brindley*, 4 Nev. & M. 235.

Formerly, if a party died after the first day of term, and before the essoign day of the next, judgment might have been entered up in the vacation after the death: because the judgment then had relation to the first day of the term. *Heapy v. Parris*, 6 T. R. 368. But as the judgment now has no such relation, but takes effect only from the day it is signed, this can no longer be done. See *Heath v. Brindley*, *supra*, and *Blackburn v. Godrick*, *ante*, p. 339.

If a warrant of attorney be given to a woman before marriage, judgment cannot be entered up after marriage without the leave of the court; and the court in that case require an affidavit, proving not only the marriage, but the execution of the warrant of attorney, and the non-payment of the debt. *Metcalf v. Boote*, 6 D. & R. 46. *Marder v. Lee*, 3 Burr. 1469. But the court will allow judgment to be entered up against

husband and wife, on a warrant of attorney given by the wife *dum sola*. *Hartford v. Mattingly*, 2 Chit. 117. *Staples v. Purser et ux.*, 2 Dowl. 764. *Higginbottom v. Higginbottom*, 8 Id. 126. If, however, in such a case it be entered by mistake against the wife only, the court will not grant a rule absolute in the first instance to rectify it, but a rule *nisi* only. *Pecock v. Fry*, 8 Dowl. 126.

*The like, after a year.*] Within one year after a warrant of attorney is executed, judgment may be entered up as a matter of course. But by R. G. H. 2 W. 4, s. 73, "leave to enter up judgment on a warrant of attorney, above one and under ten years old, must be obtained by a motion in term, or by order of a judge in vacation; and if ten years old or more, upon a rule to show cause." See *Nicholas et al. v. Morit*, 9 Dowl. 101. No person but the defendant, however, can object to any irregularity in this respect. *Jones v. Jones*, 1 D. & R. 558. In the case of a warrant of attorney, given to secure the payment of a post obit bond, the court have refused to grant more than a rule *nisi*. *Lushington v. Waller*, 1 H. Bl. 94.

Formerly, when judgments had relation to the first day of the term, the affidavit on which this application was made must have stated that the defendant was alive on some day within the term. *Eyles v. Warren*, 4 M. & S. 174. *Hamley v. Allaston*, 3 Moore, 606. But this is no longer necessary; *Cockman v. Hellyer*, 1 Bing. N. C. 3; all the court now require is to be satisfied that the defendant, or the defendants if there be more than one, *Lot v. Anderson*, 1 Dowl. N. C. 305, were alive within a reasonably short time before the motion is made; see *Croft v. Lord Egmont*, 8 Dowl. 95; and eight days, *Robinson v. Lester*, 3 Dowl. 531. *Drain v. Thompson*, 2 Hodg. 111, ten days, *Krell v. Joy*, 4 Dowl. 600, 1 Har. & W. 670. *Jordan v. Farr*, 4 Nev. & M. 347, and even thirty-six days, *Stocks v. Willes*, 5 Dowl. 221. *Watts v. Bury*, 1 Har. & W. 371, and see *Bayley v. Western*, 7 Dowl. 601. *Goodman v. Trevanion*, 9 Dowl. 328. *Powell v. Howard*, 8 Law J., 16, *cp.*, have been deemed a sufficiently short time for this purpose; and even where the time was much longer, *Patteson, J.* granted a rule *nisi*. *Husoke v. Harris*, 1 Dowl. N. C. 261. If the defendant be abroad, a still greater latitude is allowed; see *Pemberton v. Browning*, 2 Bing. 264; and therefore in Michaelmas term the court have allowed judgment to be entered up, on an affidavit that the defendant was alive in New South Wales in the August preceding, as appeared by a letter of that date received from him. *Hopley v. Thornton*, 2 D. & R. 12. *S. P. Johnson v. Fry*, 5 Dowl. 215. So they have allowed judgment to be entered up on the 10th, a letter being received from him dated at Nice, on the 27th April. *Grantley v. Summers*, 6 Dowl. 478. The affidavit usually states that the deponent "verily believes that the said J. S. is

now living, he this deponent having [seen the said J. S. alive on — at —; or, received a letter from the said J. S., in his handwriting, purporting to be dated on — at —]; merely stating that he was seen at such a time will not be sufficient, for he might have been dead at the time; *Chell v. Oldfield*, 4 Dowl. 629; but swearing to the receipt of a letter from him in his handwriting or signed by him, is sufficient to show that he was alive at the date of the letter. *Sanders v. Jones*, 1 Dowl. 367. *Gray v. Withers*, 4 Dowl. 636, 1 Har. & W. 659.

There must also be an affidavit of the existence of the debt, the giving of the warrant of attorney for it, and that it still remains unpaid and unsatisfied; *Barton v. Turner*, 8 Dowl. 122. See *Hulke v. Pickering*, 2 B. & C. 555; and this may be made by the plaintiff's attorney, *Ashman v. Bowdler*, 2 Cr. & M. 212, or the attorney's clerk, *Middleton v. Stockdale*, 1 Dowl. N. C. 776, if he know the fact. But where a warrant of attorney was given to secure a guarantee, it was deemed sufficient to swear that the guarantee was still in force. *Pickering v. Carnell*, 8 Dowl. 300. The attesting witness also must make an affidavit of the due execution of the warrant of attorney; *Jones v. Knight*, 1 Chit. 743. *Field v. Beacroft*, 2 Tyr. 283; and, if the defendant be a marksman, that the warrant was read over to him. *Semb.* See *James v. Harris*, 6 Dowl. 184. If, indeed, such attesting witness cannot be found, *Wilson v. Wilson*, 6 Nov. 1797. *MS. B.* 1974. *Waring v. Bowles*, 4 Taunt. 132; see *Cope v. Lea*, 9 Dowl. 102. *Reid v. Ford*, 1 Dowl. N. C. 187, or be out of the jurisdiction of the court, *Appleton v. Bond*, 1 Chit. 744, an affidavit verifying his handwriting to the attestation will be deemed sufficient; but his merely being confined to his bed with illness, will be no excuse for his not making an affidavit, because a commissioner might attend him and take it. *Owen v. Hoiles*, 4 Dowl. 572. If the witness refuse to make the affidavit, the court upon application will compel him. *Cuffin v. Idle*, 1 Tidd. 601. *Mille v. M'Donnoughoo*, 1 Har. & W. 184. *Ex p. Harrison*, 8 Dowl. 94. See the form of the affidavit, in the Appendix; and as to the intitling of it, see *post* tit. "Affidavit," and *Sowerby v. Woodroff*, 1 B. & A. 567.

*How signed.*] The judgment must be signed in strict pursuance of the warrant. Where the warrant authorized a judgment to be entered up in debt on bond, and it was in fact entered up in debt on a *mutuatus*, the court set it aside for irregularity. *Paris v. Wilkinson*, 8 T. R. 153. Upon a warrant to enter up judgment against two, judgment cannot be entered up against one. *Gee v. Lane*, 15 East, 592.

The warrant of attorney must be delivered to and filed with the proper clerk at the master's office, at the time of signing judgment. *R. M.* 42 G. 3, *K. B.*; *M.* 43 G. 3, *C. P.*; *M.* 43 G. 3, *Ex. Jacobs v. Neville*, 8 Dowl. 125. The mode of sign-



ing judgment is thus: *make an incipitur of the declaration on plain paper, and an incipitur on a roll, which you will get at the master's office; take these and the warrant of attorney to the proper officer at the master's office, who will thereupon sign judgment and file the warrant of attorney.* See the form of the entry on the roll, *Arch. Forms*, 338—340. It is not necessary to enter an appearance for the defendant.

*Execution.*] As soon as judgment is signed and costs taxed, the plaintiff may sue out execution as in ordinary cases. If the warrant of attorney be for the payment of money by instalments, the defendant may be taken on a *ca. sa.*, see *Atkinson v. Baynton*, 1 *Hodg.* 7, or charged in execution, if a prisoner, *Davis v. Gompertz*, 2 *Nev. & M.* 607, 2 *Dowl.* 407, for each instalment as it becomes due. In what cases execution may be taken out for the whole amount in such a case, see *Leveridge v. Forty*, 1 *M. & S.* 706. Where a warrant of attorney was given to secure an annuity, and upon default being made, judgment was entered up, and execution sued out for the whole penalty, and not merely the arrears, the court upon application set aside the execution, with costs. *Tilby v. Best*, 16 *East*, 163.

*In what cases a cognovit may be set aside.*] If the cognovit have been obtained by fraud, the court will order it to be delivered up, or taken off the file, to be cancelled. *Anon.* 1 *Chit.* 268, and see *Fell v. Riley*, *Coup.* 281. Or if it have been given by an infant, the court will make the like order. *Oliver v. Woodroffe*, 4 *Mees. & W.* 650. But the court will not do so, or order the judgment or execution to be set aside, on the ground that the debt for which it was given was illegal; *Bligh v. Brewer*, 3 *Dowl.* 266; or that part of the debt had been paid, and the cognovit was by mistake given for the whole. *Id.* But where it is alleged that the debt for which a cognovit has been given has since been paid, the court may refer it to the master to ascertain what, if any thing, is due; and upon his report, they may order it to be cancelled, &c. *Wilson v. Price*, 4 *Dowl.* 213. Where in an action against two partners, one gave a cognovit in the names of both, but without the knowledge of his co-defendant, and judgment was thereupon signed, the court on application set it aside. *Rathbone v. Drakeford*, 6 *Bing.* 375. Where a prisoner, about to apply for his discharge under the insolvent act, agreed with his attorney, who was preparing his schedule, and to whom he had given a cognovit, to omit his debt from it, and two years after his discharge, the attorney signed judgment on the cognovit, and issued execution, the court set them aside. *Tabram v. Freeman*, 2 *Cr. & M.* 451. And see *Collins v. Renton*, 9 *Dowl.* 905, but see *Philpot v. Aslett*, 1 *Cr. M. & R.* 85, *post*, p. 345.

*In what cases a warrant of attorney may be set aside.]* Every court, in which a warrant of attorney authorizes the entry of a judgment, have a jurisdiction over such warrant, even before judgment is entered upon it, and may order it to be cancelled, in order to prevent the party from acting upon it. *See Churchill v. Wallace*, 4 T. R. 695, n. And where, to a rule nisi for setting aside a warrant of attorney, which had been obtained by fraud, it was objected that the judgment was not entered up, and that the court therefore could not entertain the motion: Buller, J. said that the court had the same jurisdiction as if judgment had been actually entered up; otherwise judgment might be entered up, and execution issue in vacation, before an application could be made to the court. *Duncan v. Thomas*, 1 Doug. 186. Where therefore a warrant of attorney has been obtained by fraud, *see Duncan v. Thomas, supra*, or with intent to defraud other creditors, *Martin v. Martin*, 3 B. & Ad. 934, if the fraud be clearly made out, the court will order the warrant to be cancelled, or any judgment signed upon it, to be set aside; but if the facts be disputed, they will order an issue. *Harrod v. Benton*, 8 B. & C. 217. Where an attorney gave a party a warrant of attorney, to induce him to stay proceedings upon a rule to strike him off the roll, the court held it to be illegal and void, and ordered it to be taken off the file and cancelled. *Kirwan v. Goodman*, 9 Dowl. 330. So, where an insolvent debtor gave a warrant of attorney to a creditor, to induce him not to oppose his discharge, the court set it aside, and also a judgment entered up on it, on the ground of its being against the policy of the insolvent act. *Jackson v. Davison*, 4 B. & A. 691, and *see Tabram v. Freeman*, 2 Dowl. 375. And where a person, who had taken the benefit of the insolvent act, in order to induce one of his creditors to give him fresh credit, gave him a warrant of attorney for both the old and the new debt, the court set it aside as far as respected the old debt, allowing the plaintiff to enforce it to the extent of the new debt. *Smith v. Alexander*, 5 Dowl. 13, 2 Har. & W. 82. But where, after taking the benefit of the insolvent act, the party incurred a fresh debt with one of his creditors, paid money generally on account, and gave his promissory note for the amount of the balance of both debts; and being afterwards sued upon it, gave the creditor a warrant of attorney: the court refused to set aside a judgment entered upon it, as the defendant had had an opportunity of pleading his discharge, if he chose to avail himself of it. *Philpot v. Aslett*, 1 Cr. M. & R. 85.

Where a warrant of attorney is given for an usurious consideration, if the case be clear, the court will order the warrant of attorney to be cancelled, or will set aside any judgment which may have been entered upon it. *See Bush v. Gower, Sir.* 1043. If the usury be doubtful in point of fact, the court

will order an issue; *Cooke v. Jones*, *Cowp.* 727; but not, if the affidavits, on which the application is made, be completely answered. *Cole v. Gill*, 7 *Moore*, 353. The court of Common Pleas in one case, upon setting aside a warrant of attorney for usury, imposed on the defendant the terms of paying what was legally due for principal and interest; but the court of King's Bench have since holden that they have no power to impose any such terms. *Roberts v. Goff*, 4 *B. & A.* 92.

A warrant of attorney given by a man to a woman, to induce her to live in a state of prostitution with him, was holden void, and the court ordered it to be given up to be cancelled. *James v. Hoskins*, 1 *Tidd*, 593.

Where a warrant of attorney, by the terms of the defeazance, is made expressly a charge upon an ecclesiastical living, the court will set it aside, or any judgment which may be entered upon it, it being prohibited by statute. *Flight v. Satter*, 1 *B. & Ad.* 673. See *Colebrook v. Layton*, 1 *Nev. & M.* 374.

The court will also set aside a warrant of attorney given to secure a gaming debt. But where the plaintiff purchased a debt due by the defendant to another, the defendant representing it to be a valid debt, and the defendant afterwards gave him a warrant of attorney for it: upon an application by the defendant to set aside a judgment entered upon such warrant of attorney, on the ground that the debt was in fact a gaming debt, the court refused to interfere. *Davison v. Franklin*, 1 *B. & Ad.* 142.

A warrant of attorney given by a feme covert is void, and the court will set it aside, or any judgment entered upon it, even although the defendant have been divorced from her husband *à mens et thoro*. *Faithorne v. Blaquesire*, 6 *M. & S.* 73.

So, where a warrant of attorney has been given by an infant, the court will set it aside, or any judgment entered upon it, it being absolutely void. *Saunderson v. Marr*, 1 *H. Bl.* 75. *Wilnot v. Bye*, *M. S. B.* 1957. See also *Oliver v. Woodroffe*, 4 *Mees. & W.* 650, *ants.* p. 344. And if another person have joined with the infant as security, &c., the court will set aside the warrant of attorney or judgment as to the infant, allowing it to be enforced as against the other defendant. *Mottous v. St. Aubin*, 2 *W. Bl.* 1183. The court, however, will require the infancy to be made out by clear evidence, not being the affidavit of the defendant himself, particularly where it appears that the warrant of attorney was taken for a valuable consideration, without notice of the defendant being an infant. *Weaver v. Stokes*, 1 *Mees. & W.* 203.

But the court will not set aside a warrant of attorney or judgment on it, merely because the defendant had since become insane, and is in confinement as such. *Pigget v. Killic*, 4 *Dowl.* 287, 1 *Har. & W.* 518.

Also, where a person enters into a warrant of attorney by a false name, judgment may be entered up against him by that name, and the court will not relieve him. *See Reeves v. Slater*, 7 B. & C. 466.

Also, the defendant having given another security for the same debt, is no ground for setting aside a warrant of attorney previously given, *Anon.* 2 Chit. 423, *Stoveld v. Eade*, 4 Bing. 134, where there is no agreement that the one shall be substituted for the other. Nor will the court set it aside, for any mistake in the stamp upon it. *Hartley v. Manson*, 1 Dowd. N. C. 711.

## CHAPTER V.

### *Trial and other proceedings to verdict.*

#### SECTION I.

##### *Judgment as in case of nonsuit.*

*In what cases.*] Formerly, if a plaintiff failed to take his cause down for trial, within the time limited for that purpose by the practice of the court, the only remedy the defendant had was to take the cause himself down by proviso.

But by stat. 14 G. 2, c. 17, where any issue shall be joined in any action or suit at law in any of his Majesty's courts of record at Westminster, or the courts of Durham and Lancaster, and the plaintiff in any such action shall neglect to bring such issue on to be tried, according to the course and practice of the said courts respectively, it shall be lawful for the judges of the said courts, at any time after such neglect, upon motion made in open court (due notice having been given thereof) to give the like judgment for the defendant as in cases of nonsuit; unless the said judges, upon just cause and reasonable terms, allow any further time for the trial of such issue; and if the plaintiff shall neglect to try such issue within the time so allowed, then the said judges shall give such judgment as aforesaid.

This statute extends to penal actions as well as others; *Watson v. Jackson*, 1 Wils. 325; and to ejectment; *Doe v. Docker*, 6 Dowd. 478; but it does not extend to replevin, *Shortridge v. Hiern*, 5 T. R. 400. *Jones v. Concanon*, 3 T. R. 661. *Eggleston v. Smith*, 1 W. Bl. 375, for the defendant there as well as the plaintiff may take down the record without a proviso, both parties being deemed actors. So after an action has

abated by death, or the like, the defendant cannot have judgment as in case of a nonsuit. *Checchi v. Powell*, 6 B. & C. 253. So pending a demurrer, the court will not give judgment as in case of a nonsuit, for not proceeding to trial upon the issues in fact; *Butcher v. Kiernan*, 2 Marsh. 364. *Milton v. Griffiths*, 1 Dowl. N. C. 769; but where the defendant has judgment on demurrer as to some counts of a declaration, he may have judgment as in case of a nonsuit for the plaintiff's not proceeding to trial of the issues in fact as to the other counts. *Paxton v. Popham*, 10 East, 366. So, in an action against two, although one suffer judgment by default, yet the other may have judgment as in case of a nonsuit; for the plaintiff in such a case might be nonsuit if he had proceeded to trial. *Stuart v. Rogers et al.*, 4 Mees. & W. 649, and see *Murphy v. Donlan*, 5 B. & C. 178. Or there may be judgment as in case of a nonsuit at the instance of one of several defendants, whether they plead separately or not; for if such defendant alone appeared at the trial, the plaintiff might be nonsuit. *Jones v. Gibson et al.*, 5 B. & C. 768. And the rule in such a case will be for a nonsuit generally, and not merely confined to the defendant applying for it. *Sawyer v. Hodges et al.*, 10 Law J., 470, *ex.* And the same in other cases, where the plaintiff might be nonsuit if he were to proceed to trial. So, there may be judgment as in case of a nonsuit in an action by an executor or administrator. *Herbert v. Keal*, 4 D. & R. 834. *Woolley v. Sloper*, 2 Dowl. 208. *Pickup v. Wharton*, *Id.* 388. So, there may be judgment as in case of a nonsuit, where money is paid into court, and taken out by the plaintiff, *Doe v. Towgood*, 2 Dowl. 404, unless the payment be pleaded to the whole declaration, and the plaintiff have replied that he is satisfied.

If the plaintiff carry down the cause for trial, and obtain a verdict, which is afterwards set aside and a new trial granted, *Porzelius v. Maddocks*, 1 H. Bl. 101. *Brough v. Scarby*, 2 Har. & W. 139, although the trial were before the sheriff; *Day v. Day*, 1 Mees. & W. 39;—or if the plaintiff be nonsuited, and the nonsuit set aside and a new trial granted, *King v. Peppett*, 1 T. R. 492. *Doe v. Wynne*, 1 Chit. 310. *Ashley v. Flaxman*, 2 Dowl. 697; or in country causes, if the cause be made a *remanet*: *Brown v. Rudd*, 1 Dowl. 371. *Mewburn v. Langley*, 3 T. R. 1, and see *Gadd v. Bennett*, 2 B. & A. 709: in these cases the plaintiff is deemed to have complied with the statute, and if he afterwards make default in proceeding to trial, the court will not give judgment as in case of a nonsuit, even although the plaintiff have again given notice of trial. *Hawley v. Sherly*, 5 Dowl. 393. *Gilbert v. Kirkland*, 2 Dowl. 153, but the defendant, if he wish to have the cause tried, must proceed to trial by proviso. So if the judge at the trial stop the cause, as one not fit to be tried, the court will

not afterwards give the defendant judgment as in case of a nonsuit, for any subsequent default. *Henkin v. Gerss*, 12 *East*, 248. But although a plaintiff have entered his cause for trial, yet if he afterwards withdraw the record, the defendant may apply for judgment as in case of a nonsuit; *Burton v. Harrison*, 1 *East*, 346; unless it has been done for a particular purpose, as for a reference of the cause or the like, and the defendant or his attorney consent to it. *Hansby v. Evans*, 4 *Mees. & W.* 565. *Godfrey v. Wade*, 6 *Moore*, 488. So in town cause, if the cause be made a *remanet*, and the plaintiff afterwards withdraw the record, the defendant may have judgment as in case of a nonsuit. *Gadd v. Bennett*, 2 *B. & A.* 709. And where a cause was tried, and a new trial granted, and the defendant then took the cause down for trial by proviso, but the trial was put off at the instance of the plaintiff, on account of the absence of a material witness, he undertaking to enter it for trial at the next assizes: upon his making default, the court upon application granted a rule for judgment as in case of a nonsuit. *Jones v. Pritchard*, 2 *Tyr.* 383.

It may be necessary to add, that issue must be actually joined, and all the issues, if there be more than one; otherwise the defendant cannot move for judgment as in case of a nonsuit. And therefore where the general issue, or any other plea concluding to the country, has been pleaded, but the *similiter* has not been added, judgment as in case of a nonsuit cannot be given; *Martin v. Martin*, 2 *Bing. N. C.* 240. *Gilmore v. Melton*, 2 *Dowl.* 632. *Brown v. Kennedy*, *Id.* 639. *Seabrook v. Cape*, *Id.* 691. *Smith v. Rigby*, 3 *Dowl.* 705. *Brook v. Lloyd*, 1 *Mees. & W.* 552. *Richards et ux. v. Middleton*, 1 *Man. & Gr.* 53; and a *similiter* intitled in a wrong cause, is as none, for this purpose. *Ray v. Good*, 5 *Dowl.* 295. And where there are two or more defendants, the issue must be complete as to all, before any of them can move. *Crouther et al. v. Brandon et al.*, 8 *Law J.*, 225, *cp.* But it is not necessary that the issue should be made up and delivered; if it be joined, it is all that is required. *Heath v. Boxall*, 7 *Dowl.* 19.

Also, it may be necessary to observe that by R. G. H. 2 W. 4, s. 69, "no motion for judgment as in case of a nonsuit shall be allowed, after a motion for costs for not proceeding to trial for the same default." But if after a rule for these costs, the plaintiff be guilty of a new default, by allowing another term to pass without giving notice of trial, the defendant may move for judgment as in case of a nonsuit. *Smith v. Pole*, 5 *Mees. & W.* 491. *Dyke v. Edwards*, 2 *Dowl.* 53.

[In town causes.] In town causes, the plaintiff is not bound to proceed to trial in the same term in which issue is joined; and therefore the motion for judgment as in case of a nonsuit cannot be made until the third term inclusive, *Munt v. Tre-*

*namenda*, 4 T. R. 557. *Baker v. Newman*, 1 H. Bl. 123. *Woulfe v. Shells*, 1 H. Bl. 292. *Da Costa v. Ledstone*, 2 H. Bl. 558. *Anon.* 2 Dowl. 122. *Gates v. Terry*, 1 Dowl. 376. *Pierson v. Chessun*, 6 Dowl. 567. *Thomas v. Jones*, 7 Id. 712. *Heales v. Kidd*, 1 Dowl. N. C. 663, unless notice of trial have been given, and in that case you may move for the rule in the term next after the sittings or assizes for which such notice was given, *Hay v. Howell*, 2 New Rep. 397. *Howell v. Poulett*, 8 Bing. 272. *Dennelkey v. Richardson*, 4 Dowl. 13, 1 Har. & W. 367, even although the notice be given earlier than is required by the practice of the court. *Howell v. Poulett*, 8 Bing. 272. *May v. Husband*, 5 Mees. & W. 493. See *Ranger v. Bligh*, 5 Dowl. 235, *semb. cont.* See *Clarke v. Goldsmid*, 5 Bing. N. C. 120. And an issue joined in vacation is deemed an issue of the following term, in this respect; and therefore if issue be joined in Hilary vacation, this is the same as if it were joined in Easter term, and the defendant cannot move for judgment as in case of a nonsuit until Michaelmas term. *Dee v. Margrave*, 1 Man. & Gr. 334. *Duggan v. Wilbraham*, Id. 240. *Heale v. Curtis*, 2 Mees. & W. 76. *Gough v. White*, Id. 363. *Wingrove v. Hodson*, 2 Dowl. 379. But if notice of trial have been given for a sittings in term, and default be made, the defendant cannot move for judgment as in case of a nonsuit in the same term, but must wait until the term following; *Isaacs v. Goodman*, 1 Cr. & M. 494. *Marshall v. Foster*, 2 Id. 213. *Gripper v. Ld. Templemore*, 5 Dowl. 408. *Linley v. Poulton*, 1 Gale, 158; the general rule being, that you cannot move for the rule in the same term in which the default is made. *Prosser v. Macfarlane*, 2 Dowl. 216. But where the defendant's attorney had agreed to take short notice of trial, or to go to trial without notice, and both parties attended at the assizes with their witnesses, but the plaintiff's attorney did not enter the cause for trial: the court held that this was not equivalent to notice, and that as the plaintiff was not otherwise bound by the practice of the court to proceed to trial at those assizes, they could not give the defendant judgment as in case of a nonsuit. *Downes v. Cross*, 2 Crump. & J. 466. And on the other hand, where a defendant may move, the plaintiff cannot deprive him of his right to do so, by giving him notice of trial. *Smadley v. Christie*, 2 Dowl. 152.

But although a defendant may move within the time here mentioned, he is not bound to do so; but judgment as in case of a nonsuit may be moved for, although seven or eight years may have elapsed since issue joined; *Crowmer v. Brown*, 4 Dowl. 288. *Curtis v. Tabram*, Id. 600, 1 Har. & W. 645.

*In country causes.*] In a country cause, if issue be joined in an issuable term, the plaintiff is not bound to proceed to trial at the next assizes; and therefore a motion cannot be made

for judgment as in case of a nonsuit, until the term after the second assizes, *Hall v. Buchanan*, 2 T. R. 734. *Simons v. Folkingham*, 1 Tyr. 501. *Douglas v. Winn*, 4 Dowl. 559, 1 Har. & W. 662. *Williams v. Davis*, 5 Bing. N. C. 227. *Per Cur. in Evans v. Barnard*, 6 Dowl. 367, unless notice of trial have been given. And the same, where the issue is joined in the vacation before an issuable term, an issue joined in vacation, being deemed the same as if joined in the following term. *Dore v. Hayden*, 6 Mees. & W. 626. *Harrison v. Williams*, 6 Dowl. 772. *Downes v. Bostock*, 9 Id. 241. See *Lister v. Ventom*, 7 Id. 691, and *Williams v. Edwards*, 1 Cr. M. & R. 583 *cont.* But if issue be joined in Michaelmas or Easter term, then if the plaintiff do not proceed to trial at the next assizes, you may move for judgment as in case of a nonsuit in the term next following. *Apperley v. Morse*, 6 Dowl. 505. *Heath v. Beazell*, 7 Id. 19. And the same, where issue is joined in the vacation, before a nonissuable term. *Evans v. Barnard*, 3 Mees. & W. 276.

*Upon a writ of trial.*] In causes which may be tried before the sheriff, &c. under a writ of trial, as all the proceedings preparatory to the trial are left in the same situation as before the statute, the defendant may move for judgment as in case of a nonsuit, in the same manner as in ordinary cases. *Walls v. Redmayne*, 2 Dowl. 508. *Harwood v. Roberts*, *Id.* 534. And therefore in a country cause, where issue was joined in June, and an order obtained for a trial before the sheriff, it was holden that a motion in Michaelmas term for judgment as in case of a nonsuit was too early, although there had been two sittings at the sheriff's court since issue joined, at which the cause might have been tried. *Butterworth v. Crabtree*, 1 Cr. M. & R. 519. *Harle v. Wilson*, 3 Dowl. 658, 1 Gale, 139. And in a town cause, where the issue was joined in Easter term, and notice of trial was given for the sittings after that term, and on the same day an order for a writ of trial was obtained, but no notice of trial before the sheriff was given: upon an application for judgment as in case of a nonsuit in Trinity term, Patteson, J. granted a rule nisi, which was afterwards made absolute. *Mullins v. Bishop*, 3 Dowl. 557. And the same, where notice of trial before the sheriff has been given. But merely obtaining an order for a writ of trial has no effect in lessening the time the plaintiff would otherwise have for proceeding to trial, provided he have not also given notice of trial. Also after the plaintiff has once proceeded to trial before the sheriff, though the verdict be afterwards set aside and a new trial granted, the defendant cannot afterwards have judgment as in case of a nonsuit; but if he wish to have the cause tried, he must proceed to trial by proviso. *Day v. Day*, 4 Dowl. 740. *Corone v. Garment*, 1 Hodg. 74. Also,



where notice of trial has been given for a day in term, however early in the term it may be, and default be made, the defendant cannot make his motion during that term, but must defer it to the next. *Begbie v. Grenville*, 2 Dowl. 238. *Lenney v. Poulter*, 3 Dowl. 650.

If the court discharge the rule, upon a peremptory undertaking to try, it is usually upon an undertaking to try at the next usual court-day to be holden for that purpose, *Maddelev v. Batty*, 3 Dowl. 205, or the court-day next after a fixed time.

*The rule.*] The rule is a rule *nisi*, and is obtained upon an affidavit stating either the time at which issue was joined, and that the plaintiff has not since proceeded to trial, or that the plaintiff gave notice of trial, and that he has not since proceeded to trial in pursuance of his notice; and in this latter case, if it be intended to apply for the costs of the day, upon this rule being discharged on a peremptory undertaking, the affidavit should also state that the notice of trial was not countermanded in due time, and should show that costs have been incurred. If the affidavit state that notice of trial was given, it is immaterial if it omit to state that issue was joined. *Corbyn v. Heyworth*, 6 Dowl. 181. The statute requires notice to be given to the plaintiff; and formerly in the Common Pleas notice of motion was required to be given, but in the other two courts the rule *nisi* was deemed sufficient notice within the meaning of the statute. But now, by R. G. H. 2 W. 4, s. 68, "a rule *nisi* for judgment as in case of a nonsuit, may be obtained on motion, without previous notice: but in that case it shall not operate as a stay of proceedings." In practice it never is drawn up with a stay of proceedings. *Archer v. Smith*, 9 Dowl. 99.

Formerly, also, it was necessary that issue should be entered on record, and you were obliged to rule the plaintiff to enter it, before you could make this motion. But now by R. G. H. 2 W. 4, s. 70, "no entry of the issue shall be deemed necessary, to enable the defendant to move for judgment as in case of a nonsuit."

The rule cannot be moved for, after a motion for costs of the day for not proceeding to trial; *R. G. H. 2 W. 4, s. 69*; unless it be for a subsequent default. *Ante*, p. 349.

*Cause shown against it.*] The cause shown against the rule, either proves that the case is not such as to entitle the defendant to judgment as in case of a nonsuit at all, or shows some excuse for the plaintiff's not having proceeded to trial within the time limited for that purpose by the practice of the court. If for instance no issue have been joined, or if the application be made too soon, or if the plaintiff have already

complied with the statute by taking the cause down for trial, although the verdict or nonsuit have been set aside,—in these and other cases which we have already considered (*ante*, pp. 348, 349,) the court will discharge the rule unconditionally, and often with costs. So, if the reason for the plaintiff's not having proceeded to trial have been, that he was restrained from doing so by injunction, *Anon.* 1 *Chit.* 280, *n.*, or by the debt being paid for which the action was brought, *Monk v. Bonham*, 2 *Cr. & M.* 430. *Elias v. Elias*, 9 *Dowl.* 104, or the action otherwise settled, *Payne v. Haredale*, 1 *Dowl. N. C.* 552, or the like, the court will discharge the rule unconditionally, without any undertaking to try at another time; and sometimes with costs. *Elias v. Elias*, *supra*. *Smith v. Joy*, 2 *Dowl.* 410. But where in ejectment, defended by the tenant's landlord, the lessor of plaintiff alleged as an excuse for not proceeding to trial, that the tenant had delivered up possession to him: as this did not appear to have been done with consent of the defendant, the court refused to discharge the rule without a peremptory undertaking. *Doe v. Dyos*, 2 *Cr. M. & R.* 60. See *Greenslade v. Young*, 1 *Gale*, 46. Where the defendant or his attorney have by any act of theirs prevented the plaintiff from proceeding to trial, or induced him not to do so, if he afterwards obtain a rule *nisi* for judgment as in case of a nonsuit for that default, the court will discharge the rule unconditionally, and usually with costs. See *Rendell v. Bailey*, 2 *Dowl.* 113. *Grey v. Hutchins*, 3 *Dowl.* 414. *Watkins v. Giles*, 4 *Dowl.* 14. *Partridge v. Slater*, 5 *Dowl.* 68. *Howell v. Jacobs*, *Id.* 394. *Jenkins v. Charity*, 2 *Dowl.* 197. *Doe v. Lord*, *Id.* 419. See also *Cocker v. Shuttleworth*, 9 *Dowl.* 321. *Alford v. Fellowes*, *Id.* 326. But it is no ground for discharging such a rule unconditionally, that the action was commenced and carried on by an attorney, without any authority from the plaintiff; *Barber v. Wilkins*, 5 *Dowl.* 305; if such be the fact, the plaintiff may have his remedy over against the attorney; and in one case, under such circumstances, the court enlarged the rule, and granted the plaintiff a rule against the attorney, to show cause why he should not pay the costs. *Mudry v. Newman*, 1 *Cr. M. & R.* 402. Nor is it any ground at all for discharging the rule, that the plaintiff, being proceeding against the defendant both at law and equity, was put to his election, and elected to proceed in equity. *Johnstone v. Pring*, 9 *Dowl.* 395.

In cases where the defendant would otherwise be entitled to judgment as in case of a nonsuit, if the plaintiff state a reasonable excuse by affidavit for not having proceeded to trial, the court will discharge the rule, upon a peremptory undertaking to try at the next assizes or at the sittings after term. See *Cook v. Brookes*, 1 *Dowl. N. C.* 504. A slight excuse will in general be deemed sufficient for a first default;

but some excuse must be offered, otherwise the court will make the rule absolute. *Nicholl v. Collingwood*, 2 Dowl. 60. *Mallan v. Jopson*, 9 Law J., 13, *ex.* The absence of a material witness, is a sufficient excuse, and it is not required that the name of the witness should be stated in the affidavit; *Jordan v. Martin*, 8 Taunt. 104; but where it appeared that the witness, if he were present, could not have been allowed to give evidence, the court in a penal action made the rule absolute! *Bunyan v. Yerbury*, 1 D. & R. 448. Where however in a *qui tam* action for penalties for stock-jobbing, it was stated that the broker, who negotiated the illegal bargains, thinking that by his testimony he might subject himself also to penalties, refused to give evidence until the time limited for suing him should have expired, the court held this a sufficient excuse for not proceeding to trial, and discharged a rule for judgment as in case of a nonsuit, although it appeared that the broker's liability would not cease for ten months. *Rogers v. Spicer*, 7 T. R. 178. So, that the plaintiff was not able to obtain the necessary documentary evidence in time to proceed to trial, will be deemed a sufficient excuse. *Greenhill v. Mitchell*, 6 Taunt. 150, and see *Alengil v. Pierson*, 1 B. & P. 103. So, the insolvency or the extreme poverty of the defendant, will be a sufficient excuse, if it appear that the plaintiff did not know of it until after action brought. *Bailey v. Wilkinson*, 2 Dowl. 671. *Smith v. Davies*, 1 Man. & Gr. 961. *Wainwright v. Gibson*, 9 Dowl. 108. *Fisher v. Lidiard*, *Id.* 545. *Topping v. Brown*, *Id.* 582. *Felder v. Crew*, 4 Dowl. 50. But an affidavit of mere hearsay upon the subject, is not sufficient. *Symes v. Amor*, 6 Mees. & W. 814. *Mann v. Williamson*, 7 *Id.* 145. *Roden v. Stewart*, 1 Dowl. N. C. 771. In such cases the court usually recommend the parties to enter a *stet processus*, and if the plaintiff will not consent, he must give a peremptory undertaking; if the defendant refuse, the court will discharge the rule, and sometimes with costs. *Holland v. Henderson*, 4 Mees. & W. 587. *Gingell v. Beam*, 1 Man. & Gr. 565. *Faulkner v. Whittall*, *Id.* 472. See *Smith v. Badcock*, 5 Dowl. 91. But the insolvency or poverty of the plaintiff is no excuse; *Fredsham v. Rust*, 4 Dowl. 90. *Cleasby v. Poole*, 1 Cr. M. & R. 521; although a mere temporary want of funds is; *Radford v. Smith*, 4 Mees. & W. 100; and where some other excuse was made, and the plaintiff offered a peremptory undertaking, but it also appeared that the plaintiff had become insolvent, and had vested his property in trustees, who now had the control of the action, the court obliged the plaintiff to give, not only a peremptory undertaking, but also security for costs. *Nicholson v. Milne*, 1 Har. & W. 211. *Taylor v. Montague*, 2 Mees. & W. 315. See *Solomon v. Leck*, 9 Dowl. 361. Where the plaintiff withdrew his record, on the recommendation of his counsel that the cause should be tried by a

special jury, this was holden to be a sufficient excuse. *Webber v. Roe*, 3 Dowl. 589. Where a severe domestic affliction had prevented the plaintiff's attorney from proceeding to trial, it was holden a sufficient excuse. *Weak v. Calloway*, 7 Price, 531. Where the excuse was, that the plaintiff being on a journey, and not returning until the day before the assizes, the attorney could not prepare his briefs in time to proceed to trial at those assizes, the court held that the excuse, though slight, was sufficient. *Stone v. Farey*, 1 East, 544. That there was another action pending, and then in the new trial paper for argument, which would decide the point in litigation between the parties, has been deemed a good excuse for not proceeding to trial, even after a peremptory undertaking; *De Rutzen v. Richards*, 1 Har. & W. 210; but the affidavit must disclose the name of such cause, and show the point in dispute in both. *Wynn v. Bellman*, 6 Taunt. 122. And the court usually make no distinction between penal and other actions in this respect. *Per Ld. Kenyon*, *Stone v. Farey*, 1 East, 554. Where the plaintiff had acted unfairly to the defendant, by refusing to consent to the examination of a witness upon interrogatories, who was going abroad, the court made the rule absolute for judgment as in case of a nonsuit, although the excuse offered was such as under other circumstances would have been deemed sufficient. *Almgill v. Pierson*, 1 B. & P. 103. If the rule be discharged on an affidavit which is false in fact, the court will not afterwards open it, upon an affidavit disproving the statements in the former one. *Davis v. Cottle*, 3 T. R. 405.

By R. G. H. 2 W. 4, s. 69, "the court on discharging a rule for judgment as in case of a nonsuit, may order the plaintiff to pay the costs of not proceeding to trial; but the payment of such costs shall not be made a condition of discharging the rule." The defendant's affidavit, in strictness, should show that costs have been incurred; *Ray v. Sharp*, 4 Dowl. 354; but the counsel usually indorse on their briefs "costs of the day, if any," whether it appear from the affidavit that such costs have been incurred or not. *See Doe v. Owen*, 1 Mees. & W. 322. But if the rule for judgment as in case of a nonsuit be made absolute, it is unnecessary to move for or mention the costs of the day; for these costs form part of the costs of the nonsuit. *See Johnson v. Smith*, 1 Dowl. 421.

Care must be taken to draw up this rule, before default is made in the undertaking, *see Gingell v. Bean*, 1 Man. & Gr. 50, and to serve it on the plaintiff's attorney in time to enable him to go to trial according to his undertaking. *Sawyer v. Thompson*, 11 Law J., 90, ex., 9 Mees. & W. 248.

*The undertaking, &c. and how complied with, &c.]* When the rule comes to be discussed before the court, if they discharge

it, they may do so upon such terms with respect to either party as they think fit. When they discharge it upon a peremptory undertaking, they sometimes annex other terms to it: as where it appeared that the plaintiff was insolvent, and had assigned his property to trustees, who had the control of the action, the court obliged him not only to give a peremptory undertaking, but also to give security for costs. *Nicholson v. Milne*, 1 Har. & W. 211, and see *ante*, pp. 247, 248. On the other hand, where, in an action against an executrix, who had pleaded the general issue and *plene administravit*, the plaintiff, in showing cause against a rule for judgment as in case of a nonsuit, expressed a wish to take judgment *quando*, &c. on the latter plea, instead of denying it as he had already done, and offered a peremptory undertaking to proceed to trial on the general issue: the court allowed this to be done, although the defendant objected to it. *Lucas v. Jenner*, 2 Dougl. 64. Where the insolvency of the defendant is the excuse for not proceeding to trial, we have seen (*ante*, p. 354), that if the defendant refuse to consent to a *stet processus* the court will discharge the rule unconditionally. But the court cannot order a peremptory undertaking to try before the sheriff, where the debt indorsed on the writ exceeds 20*l.*, although the plaintiff by his particulars claim a less sum; at least not without having the writ previously amended. *Frodsham v. Round*, 1 Har. & W. 677.

An undertaking to try at the assizes, is complied with, by duly entering the cause for trial with the judge's marshal; and if the cause be afterwards made a remanet, without the fault of the plaintiff, the court will not grant a peremptory rule for judgment as in case of a nonsuit against him. But in town causes, a plaintiff is not deemed to have complied with the undertaking, by merely passing the record and entering the cause for trial, but he must continue to keep the record and jury process in a state for trial, until the court come to the cause in its turn. If it then be made a remanet, for some cause not within the control of the plaintiff,—as if it be made a remanet, because there is no time to try it, *Anon. Tr.* 1818, *M. S. B.* 3072, or the like,—the court will not give the defendant a peremptory rule for judgment.

If however the plaintiff fail in complying with his undertaking, the defendant may move for judgment against the plaintiff as in case of a nonsuit, for not having proceeded to trial in pursuance of his peremptory undertaking, even in cases where the trial was to have been before the sheriff; *Willis v. Oakley*, 6 Dougl. 766; and see *Seff v. Adams*, 7 Dougl. 672; and which rule is obtained on an affidavit, stating the first rule, stating and annexing the rule discharging it and the undertaking, and stating that the plaintiff has not since proceeded to the trial of the cause. See the form in the Appendix. This is a rule

absolute in the first instance, in all the courts; see *Williams v. Edwards*, 3 Dowl. 660. R. H. 1 Vict. C. P.; and therefore the plaintiff, if he have a sufficient excuse for not having proceeded to trial, should, early on the first day of term, and if possible before the defendant's rule is moved for, move for a rule nisi to enlarge the peremptory undertaking. And if default be made in the term, this rule may be moved for in the same term. *Ashton v. Johnstone*, 8 Dowl. 299. If however the defendant's rule be actually drawn up, the plaintiff, besides moving to enlarge the undertaking, should also move at the same time that the defendant's rule should be discharged. See *Charrington v. Meatheringham*, 4 Dowl. 479. *Ward v. Turner*, 5 Dowl. 22, 2 Har. & W. 90. See *Kelly v. Flint*, 5 Dowl. 293. In the Common Pleas, however, the rule is nisi only, *Whalley v. Followes*, 1 Hodg. 77, and the plaintiff therefore has an opportunity of showing any cause he may have against it.

Where the cause has been made a *remanet*, without the fault of the plaintiff, as above mentioned, this has been deemed a good ground to enlarge or show cause against the rule. *Ante*, p. 356. So where the cause was set down for the sittings after term, but as there was no prospect whatever of it being then tried, the plaintiff omitted to carry in the record to the marshal's office, the court held that this was sufficient to prevent the defendant from applying for the peremptory rule. *Cope v. Holt*, 1 D. & R. 180. Where after the plaintiff had given the peremptory undertaking, the defendant paid him the debt and costs, this of course was held a good ground for moving to discharge the peremptory undertaking; but the plaintiff having applied also to have a *stet processus* entered, the court said that they could not compel the defendant to do so, as that could only be done by consent. *Shrimpton v. Carter*, 3 Dowl. 648. In a special jury cause, for not setting out tithes, the absence of eleven of the special jurors was deemed good cause for the plaintiff's not trying the cause, and the court discharged the peremptory rule for judgment as in case of a nonsuit. *Master v. Mûner*, 1 Bing. 70. So, the absence of a material witness, at the time the plaintiff should have proceeded to trial in pursuance of his undertaking, has been deemed a sufficient ground for moving to enlarge it; *Montfort v. Bond*, 2 Dowl. 403. See *Wyatt v. Nicholas*, 9 Dowl. 327; but the court in another case refused to enlarge the undertaking, where the plaintiff did not proceed to trial, because his principal witness was fearful that his testimony might prejudice his interest in a matter then before the House of Lords. *Muston v. Tabard*, 2 Har. & W. 138. So, where the plaintiff, who conducted his cause in person, had attended the court several days when it was expected to come on, but was arrested on the last of these days whilst returning to his house, and was absent and in custody at the time the cause was called on and struck out of the

paper: the court held this to be a good ground for discharging the peremptory rule. *Pitt v. Evans*, 2 Dowl. 226. So, where the trial was prevented, by the plaintiff's attorney absconding, the court enlarged the peremptory undertaking. *Bolcot v. Hughes*, 1 Chit. 279. So, where in the hurry of business the notice of trial was delivered a little too late, and the defendant, by objecting to and returning it, prevented the plaintiff from proceeding to trial, the court held it to be a sufficient ground to discharge the peremptory rule. *Charrington v. Meatheringham*, 4 Dowl. 479. So, where another cause was pending, to try the same right, and was in the new trial paper for argument, and the plaintiff when he gave the peremptory undertaking supposed that the case would be argued before he would have to proceed to trial: Williams, J. held this to be a good ground for discharging the former undertaking, upon his entering into another to try at the next assizes; *De Rutzen v. Richards*, 1 Har. & W. 210; but the affidavit in such a case must state the name of the other case pending, and the points arising in both cases. *Wynn v. Bellman*, 6 Taunt. 122. So where, in consequence of several other causes being referred, the cause was called on at a time when the plaintiff's witnesses and the defendant's counsel were absent, and upon the plaintiff declining to withdraw the record, the cause was struck out: Coleridge, J. allowed the peremptory undertaking to be enlarged. *Saxon v. Swabey*, 4 Dowl. 105, 1 Har. & W. 345. And where after default made, the defendant agreed to refer the cause, this was deemed a waiver of the undertaking altogether. *Spurr v. Rayson*, 5 Mees. & W. 339. So, in an action by husband and wife, where after default made, the husband died, the court held that the wife was not bound by the undertaking, although the action had been brought in right of her as executrix. *Lee et ux. v. Armstrong*, 9 Mees. & W. 14. But where the notice of trial was countermanded, because it was found that the declaration required amendment, the court held this to be no sufficient reason for not complying with the peremptory undertaking. *Haines v. Taylor*, 2 Dowl. 644. So where a peremptory undertaking was given to try at the next assizes, but shortly afterwards the plaintiff obtained a judge's order to try before the sheriff and to relieve him from the undertaking, and he did not afterwards proceed: the court held that the effect of the judge's order was merely to substitute the trial before the sheriff for the trial at the assizes, and that the plaintiff was therefore entitled to his peremptory rule for judgment. *Williams v. Edwards*, 3 Dowl. 660.

Where the peremptory undertaking is enlarged, or the peremptory rule discharged, as above mentioned, it is always upon payment to the defendant of the costs of the motion, and of the costs of the day, or such other costs as he may have been put to by the plaintiff not complying with his under-

taking; see *Pitt v. Evans*, 2 Dowl. 266. *Percival v. Bird*, 4 Dowl. 748. *De Rutzen v. John*, 5 Dowl. 400; and the payment of these costs may be made a condition precedent to the court's granting such further indulgence. *Dennehaye v. Richardson*, 4 Dowl. 464, 1 Har. & W. 653.

*Stet processus.*] A *stet processus* is an entry on the record of an action, whereby it is ordered by the court, "with the consent of the parties aforesaid, that all further proceedings herein be stayed; and let them be stayed accordingly," &c. If upon showing cause against a rule for judgment as in case of a non-suit, the court recommend a *stet processus*, we have seen (*ante*, p. 354) that if the plaintiff will not consent, he must give a peremptory undertaking; if the defendant refuse, the court will discharge the rule, and sometimes with costs. See *Smith v. Badcock*, 5 Dowl. 91. The court however have no power to order it, without the consent of both parties. Where a defendant became bankrupt, and afterwards, upon his attorney attempting to force the plaintiff on to trial, by giving notice of trial by proviso, the plaintiff applied to the court for leave to enter a *stet processus*: but the court refused it, saying there was no authority to warrant such an application. *Thompson v. Percival*, 5 B. & Ad. 934, 925. So where the defendant applied for a *stet processus*, on an affidavit stating that he had paid the debt and costs to the plaintiff, and the plaintiff refused to consent, Alderson, B. said that he could not compel him; it was optional with the plaintiff to do so or not. *Shrimpton v. Carter*, 3 Dowl. 648.

## SECTION II.

### *Costs of the day for not proceeding to trial.*

*In what cases.*] If notice of trial be given, and the party do not proceed to trial in pursuance of his notice, or countermand it in due time, he shall pay such costs as the other party may have incurred, by reason of his not having done so. *R. M.* 1654, s. 18, K. B.; *R. M.* 1654, s. 21, C. P. Even "where a pauper omits to proceed to trial, pursuant to notice or an undertaking, he may be called upon by a rule to show cause why he should not pay costs, though he has not been dispaupered." *R. G. H.* 2 W. 4, s. 110; and see *Doe v. Edwards*, 2 Dowl. 471, 468. If the party however be ready to try, at the sittings or assizes for which he has given notice, but the cause be made a *remanet* by consent, *Blow v. Wyatt*, 4 Mees. & W. 407, or otherwise, he will not be liable to costs, even although he do not re-enter his cause for the next sittings or assizes. See *Waters v. Weatherby*, 3 Dowl. 328. But a defendant will be



entitled to costs of the day, where the plaintiff has not proceeded to trial in pursuance of notice, although the defendant have entered the cause by proviso, and might have tried it if he had thought fit. *Blow v. Wyatt*, *supra*.

*The motion, &c.*] In the Queen's Bench and Common Pleas, the rule is absolute in the first instance; except where the plaintiff sues *in forma pauperis*, in which case the motion is for a rule *nisi* only. *Doe v. Edwards*, 2 Dowl. 468. In the Exchequer, it is what is there termed a rule *nisi*, namely, a rule which becomes absolute of itself in four days, unless cause be shown against it in the meantime. *Robinson v. Robinson*, 3 Dowl. 177, and see *Eaton v. Shuckburgh*, 2 Dowl. 624. The application may be made at any time whilst the cause is in existence, that is to say, until the debt or damages and costs are satisfied by execution; and therefore, where it was not made until after the plaintiff had obtained a verdict, signed judgment, and taxed his costs, the court held it to be in sufficient time. *Redit v. Lucock*, 2 Cr. & M. 337. And a term's notice is not necessary, previously to making this application. *French v. Burton*, 2 Crompt. & J. 634. It cannot be moved with a stay of proceedings; *Eager v. Cuthill*, 3 Mees. & W. 60. *Gibbs v. Gales*, 7 Dowl. 325. *Friden v. Bray*, 9 Id. 329; nor will the court make the payment of these costs a condition precedent to the plaintiff's taking down his cause for trial, although there have been more than one default. *Shoredicke v. Gilbard et al.*, 8 Dowl. 296. The affidavit may be "*that issue was joined in this cause in — term last, and notice of trial given on the part of the above-named plaintiff for —. And this deponent further saith that the said plaintiff did not proceed to the trial of this cause in pursuance of his said notice, nor hath he countermanded the same [in due time].*"

The defendant is always in a situation to move for judgment as in case of a nonsuit, where he may move for costs of the day. But if he intend to move for the former, he should not move for costs of the day, until the other rule has been disposed of. For by R. G. H. 2 W. 4, s. 69, "no motion for judgment as in case of a nonsuit shall be allowed, after a motion for costs for not proceeding to trial for the same default; but such costs may be moved for separately, that is, without moving at all for judgment as in case of a nonsuit, or after such motion is disposed of; or the court, on discharging a rule for judgment as in case of a nonsuit, may order the plaintiff to pay the costs of not proceeding to trial: but the payment of such costs shall not be made a condition of discharging the rule."

In discharging a rule for judgment, as in case of a nonsuit, the court will grant the costs of the day as part of their rule, without requiring a separate rule for the purpose, *Piercy v.*

*Owen*, 1 Dowl. 362. *Linniker v. Barr*, *Id.* 563, provided it appear from the affidavit that costs have been incurred; *Ray v. Sharp*, 4 Dowl. 354; or they will grant the "costs of the day, if any," whether such costs appear to have been incurred or not, provided the affidavit do not show that no such costs could have been incurred. *Doe v. Owen*, 1 Mees. & W. 322. But if the rule for judgment as in case of a nonsuit be made absolute, it is unnecessary to move for or mention the costs of the day; because these costs form part of the costs of the nonsuit. See *Johnson v. Smith*, 1 Dowl. 421.

### SECTION III.

#### *Trial by proviso.*

*In what cases, &c.*] Where the plaintiff has made default in bringing his cause on for trial, within the time limited for that purpose by the practice of the court, the defendant may take the cause down for trial by proviso. As to the time so limited, see *ante*, pp. 349, 350. But by R. G. H. 2 W. 4, s. 71, "no trial by proviso shall be allowed, in the same term in which the default of the plaintiff has been made." In the case of an issue out of chancery, however, the court have allowed the defendant to take the cause down for trial, before any default by the plaintiff, upon the defendant suggesting that the plaintiff wished to delay the trial. *Humpage v. Rowley*, 4 T. R. 767. *Bassett v. Osborne*, 6 Moore, 473. But where, upon a special jury cause being called on for trial, there was not a full special jury, and neither party prayed a tales, it was holden that the defendant could not on this account afterwards take the cause down by proviso. *Phillips v. Dance*, 9 B. & C. 769.

*Proceedings to trial.*] No rule for a trial by proviso is now necessary; R. G. H. 2 W. 4, s. 71; nor is it necessary that the issue should previously be entered: *Id.* s. 70: as was formerly required.

The jury process is the same as in ordinary cases, except that in the *distringas* or *habeas corpora*, immediately before the words "*and have you there*," &c., is inserted this proviso: "*Provided always that if two writs shall come to you thereupon, you shall then execute and return one of them only*:" from which clause, the trial by proviso takes its name.

The *nisi prius* record is made up by the defendant. And he must give the plaintiff the same notice of trial, which the plaintiff would have been obliged to give, if he had proceeded to trial, except that the form is, "*take notice of trial by proviso*," &c.. A term's notice is not necessary. *Theobald v. Crickmore*, 2 B. & A. 594.

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If the defendant take down and enter his record for trial, and the plaintiff do not,—in that case, when the cause is called on, if the plaintiff appear, the cause is tried in the ordinary manner; but if the plaintiff do not appear, he must be nonsuit. *Gardener v. Davis*, 1 Wils. 300. *Brown v. Ottley*, 1 B. & A. 253. *Hodgson v. Foster*, 1 B. & C. 110. If both parties enter their records, then, if the plaintiff have given due notice of trial, the trial shall be by his record; but if he have not given due notice of trial, *Brown v. Ottley*, 1 B. & A. 253, or if he withdraw his record, the trial shall be by the defendant's record.

The trial by proviso is now little in use, being nearly superseded in practice by the application for judgment as in case of a nonsuit. See *ante*, p. 347.

#### SECTION IV.

##### *Nisi prius record.*

*Form of it.*] The *nisi prius* record is engrossed upon parchment. The placita, formerly inserted, are now omitted; and the form, by R. G. H. 4 W. 4, r. 2, sch. No. 2, is now thus: copy the issue, to the end of the award of the venire, (entering the declaration and other pleadings under the date of the day of the month and year when they were respectively pleaded, unless otherwise ordered by the court or a judge; R. G. H. 4 W. 4, r. 2, s. 1); then proceed as follows:

"*Afterwards, on the [teste of the distringas or habeas corpora] day of —, in the year —, the jury between the parties aforesaid is respited here until the [return day of the distringas or habeas corpora] day of —, unless — shall first come on the [first day of the sittings, or commission day of the assizes] day of —, at —, according to the form of the statute in such case made and provided, for default of the jurors, because none of them did appear. Therefore let the sheriff have the bodies of the said jurors accordingly.*"

As to variances between the *nisi prius* record and the issue, see *ante*, pp. 325, 326. Where the *nisi prius* record omitted the date of the writ of summons, and it did not appear whether the issue mentioned it, the judge at the trial amended the record from the writ itself, by inserting it: and the court held that he had authority to do so; but they also held that the production of the writ proved the time of the commencement of the action sufficiently, notwithstanding the omission of any mention of it in the record. *Cox v. Painter*, 6 Ad. & El. 491.

*How sealed, passed, and entered for trial.*] In the court of Queen's Bench, an *incipitur* of the issue must be entered upon the roll, before the *nisi prius* record can be sealed or passed; *R. T. 1 J. 2*; and upon producing it, and a copy of the issue, and the record of *nisi prius*, to the clerk of the judgments, he will sign the record of *nisi prius*. It is then taken to the clerk of *nisi prius*, who will seal and pass it. In the Common Pleas and Exchequer, the master signs, seals, and passes the record of *nisi prius*, and his clerk will then give you a roll to enter the pleadings on, which however may be done at a future period.

Where the record of a case, to be tried in the county palatine of Lancaster or Durham, is made up in any of the courts at Westminster, the record of *nisi prius* is an exact copy of the issue, comprising the pleadings and an award of a *mittimus*, as in the Appendix: *get it sealed and passed as above directed; then engross a mittimus on plain parchment, (see the forms, Arch. forms, 101, 102, 110), and get it signed and sealed; and then send the record and mittimus to the country attorney, who will sue out the jury process.*

Before entering the cause for trial, it is necessary in some cases to annex to it the particulars of the plaintiff's demand. By *R. G. T. 1 W. 4, s. 6*, (which directs that where the declaration contains a count in *indebitatus assumpsit*, or debt on simple contract, the plaintiff shall deliver with the declaration particulars of his demand, not exceeding three folios; or if he neglect to do so, and a judge shall afterwards order a delivery of particulars, the plaintiff shall not be allowed the costs of the summons, or of the particulars so delivered:) it is ordered that a copy of the particulars of the demand, and also particulars (if any) of the defendant's set-off, shall be annexed by the plaintiff's attorney to the *nisi prius* record, at the time it is entered with the judge's marshal.

In country causes, you must get the *venire* returned by the sheriff's agent in town, and the *distringas* or *habeas corpora* returned by the under-sheriff in the country; in town cases, both writs are returned at the sheriff's or secondary's office. After being returned, annex the writs and panels also to the record of *nisi prius*.

*Then take the record, &c., to the judge's marshal, in town or at the assizes, and enter the cause for trial.* In town causes, to be tried in term, this must be done two days at least before the sittings; *R. H. 15 & 16 C. 2, r. 2, K. B.*; *R. E. 1 G. 2, C. P.*; for the sittings after term in Middlesex, on or before the day of the sittings; *R. H. 34 G. 3, r. 2, K. B.*; *R. H. 8 G. 1, C. P.*; and for the adjournment day in London, two days before. *R. H. 34 G. 3, r. 2, K. B.*; *R. H. 32 G. 3, C. P.* Where the record, in a cause intended to be tried at the second sittings in Michaelmas term (22 Nov.) was passed on the 10th,

the issue being joined only on the 4th, and on the 12th the defendant obtained an order to stay proceedings on payment of debt and costs; and in taxing the costs the master refused to allow the costs of passing the record, deeming it to have been passed before there was any necessity for it: the court of Exchequer held that it was in the discretion of the master to allow or disallow it under the circumstances, both in that court and the court of Queen's Bench, although otherwise in the Common Pleas. *McKeene v. Smith*, 2 *Mees. & W.* 85. In country causes, it must be entered with the marshal before the first sitting of the court after the commission day; *R. H.* 14 *G.* 2, *K. B. & C. P.*; except with respect to the second list at York; and the causes in that list may be entered at any time before twelve o'clock on the second day. And in Norfolk and Norwich, the causes must be entered before the sitting of the court on the day after the commission day. *R. H.* 32 *G.* 3.

By *R. G. H.* 4 *W.* 4, r. 1, s. 18, "it shall not be necessary to repass any *nisi prius* record, which shall have been once passed, and upon which the fees of passing shall have been once paid; and if it shall be necessary to amend the day of the teste and return of the *distringas* or *habeas corpora*, or of the clause of *nisi prius*, the same may be done by the order of a judge, obtained on an application *ex parte*." And in case of a remanet, it is not even necessary to have a judge's order to amend the jury process, &c. *Wells v. Day*, 8 *Ad. & El.* 941.

Formerly, in country causes, where the record was made up in the Exchequer, it was necessary also in such case to sue out a separate commission to the judges of assize, to give them jurisdiction; for the stat. Westm. 2, c. 30, which gave justices of assize cognizance of pleas in the courts of Queen's Bench and Common Pleas, did not extend to the Exchequer. But this is now no longer necessary. 2 & 3 *Vict. c.* 22.

#### SECTION V.

#### *Jury process.*

##### 1. *In common jury cases.*

In the Queen's Bench and Exchequer, the jury process is by *venire* and *distringas*; in the Common Pleas, by *venire* and *habeas corpora juratorum*. The *venire* commands the sheriff that he cause the jurors to come to Westminster; it may be tested on the day it is issued, and made returnable forthwith, 3 & 4 *W.* 4, c. 67, s. 2, or on a day certain in term. *Drake v. Gough*, 1 *Dowl. N. C.* 573. The *distringas* commands the sheriff to distrain the jurors mentioned in a panel annexed,

and which are the same returned in the panel to the *venire*, so that he have their bodies at Westminster on a certain day, or before the lord chief justice or the judges of assize respectively, if they shall first come to the county or place where the venue is laid. The *habeas corpora* is nearly the same only omitting the *distringas* clause, and commanding the sheriff that he have the bodies of the jurors at Westminster, &c. These writs are tested on a day subsequent to the teste of the *venire*, 3 & 4 W. 4, c. 76, s. 2, and are made returnable on some day in term after the sittings or assizes at which the cause is to be tried; except in a trial at bar, in which case the *distringas* or *habeas corpora* is returnable on the very day on which the cause is to be tried. In all cases these writs must be directed to the sheriff of the county, &c. where the venue is laid. See as to the direction of writs, *ante*, pp. 151, 152. The writ itself must also be conformable with the award of it in the issue. See *Codrington v. Lloyd*, 8 Ad. & El. 449.

Get blank forms at the stationer's, and fill them up. See the forms in the Appendix. Get them signed at the master's office, and sealed. In Middlesex take them to the sheriff's office, in London to the office of the secondary, and get both writs returned; the court of Exchequer have holden that one panel to both writs is sufficient. *Green v. Smith*, 5 Dowl. 174, but see *Rogers v. Smith*, 1 Ad. & El. 776. In country causes, get the *venire* returned by the under-sheriff's agent in town, and the *distringas* or *habeas corpora* by the under-sheriff in the country; see *Rogers v. Smith*, *supra*; in actions in the Queen's Bench and Exchequer, the agent sends the *venire* and panel, and the *distringas*, to the plaintiff's attorney in the country; in the Common Pleas, he sends the *habeas corpora* only, the *venire* and panel being filed here.

## 2. In special jury cases.

In special jury cases, the *venire* is in the usual form; but the *distringas* or *habeas corpora* is special, setting out the names of the jurors. Both are directed, tested and returnable, as the writs in common jury cases. In trials at *nisi prius*, the rule for a special jury is granted as of course; see *stat.* 6 G. 4, c. 50, s. 30; except that if granted to a defendant, or to a plaintiff in replevin, there must be "an affidavit, either stating that no notice of trial has been given, or if it has been given, then stating the day for which such notice has been given; and in the latter case no such rule is to be granted, unless such application is made for it more than six days before that day: provided that a judge may on summons order a rule for a special jury to be drawn up at any time."

*R. G. H. 1 Vict. r. 2.* Get a motion paper, indorsed to move for a special jury, signed by counsel, and upon producing it to the clerk of the rules at the master's office, he will draw up the rule. Then get an appointment on it from the master, and serve a copy of the rule and appointment on the opposite attorney or agent, and on the under-sheriff or secondary in town causes, or on the sheriff's agent in country causes.

In Middlesex and London, no cause shall be tried by a special jury, "unless the rule for such special jury be served, and the cause marked in the marshal's book as a special jury, on or before the day preceding the adjournment day in Middlesex and London respectively." *R. H. 44 G. 3, K. B.; R. T. 52 G. 3, C. P.* And it must be served sufficiently early, to enable the opposite party to strike the jury before the day of trial; therefore where it was not served until six o'clock in the evening preceding the day of trial, and the cause was tried by a common jury, it was holden that the cause was properly tried. *Gunn v. Honeyman*, 2 B. & A. 400; and see *Chuck v. Harris*, 1 M. & Gr. 940. And where the rule for the special jury was obtained on the 11th January, but not served until the 15th, the court of Common Pleas, upon application, discharged it. *Phelps v. Keiley*, 11 Law J., 99, *cp.* The court, however, under particular circumstances, and under terms favourable to the plaintiff, have allowed a defendant to have a special jury, although the cause had stood for trial during a whole sitting as a common jury cause, and although the trial had been twice postponed at the instance of the defendant. *Thorne v. Marq. Londonderry*, 8 Bing. 26.

The jury are next struck; that is to say, the attorneys on both sides, and the under-sheriff or his agent with his special jurors' list, attend before the master; and certain numbers, corresponding with the names of the jurors, being put into a box, and shaken, the master takes out 48; and the names then being put down on paper, the parties may object to any of them for cause, and if the master allow the objection, he will draw out another number from the box instead of the juror objected to. See 6 G. 4, c. 50, ss. 32, 33. The master's clerk then makes out a list of the 48 jurors for each party, and another appointment is given for striking them. Serve the appointment, and at the time appointed attend before the master, who will strike out the names of 12 jurors for each party, leaving the names of 24 jurors; which names are then inserted in the special distringas. As to the striking of a special jury, where the cause of action has arisen in a county of a city or town, other than London, see 6 G. 4, c. 50, s. 36. If the attorney of either party do not attend before the master, at the times so appointed, for naming and striking the jury, the master may proceed *ex parte* at the instance of the other. *R. T. 8 W. 3, K. B.* If a de-

defendant obtain and serve the rule for a special jury, but take no other steps upon it, the plaintiff will be entitled to have the cause tried in its order as a common jury cause; and the court will not afterwards relieve the defendant, except under very special circumstances. *Farren v. Richards*, 2 Stark. 369. They will seldom discharge the rule, even although it appear to have been obtained merely for a delay; for either party has a right to have the cause tried by a special jury, if he think fit. See *Cradock v. Davis*, 1 Chit. 176. *Anon. Id.* 176, n. But if it appear clearly that the rule has been obtained merely for delay, the chief justice upon application may order the cause to be tried at any of the sittings within the term, or on some particular day, *Bloxham v. Brown*, 4 Taunt. 470. *Maltby v. Moses*, 1 Chit. 489, if it appear to be a case of a description, not requiring a special jury to try it. *Trip v. Patmore*, 4 Moore, 470. And it is now the usual practice in such cases for the plaintiff, instead of moving to discharge the rule for the special jury as formerly, to move for a rule to show cause in two days, why the cause should not be tried in its order; and if it be made absolute, and the defendant be ready with his special jury at the time, he may have it tried by it; otherwise it will be tried by a common jury, on the common panel. *Bush v. Pring*, 9 Dowl. 180. But the court or a judge will not interfere, even in this way, in any other case, or unless it appear clearly that the only object of the party in obtaining the rule is delay. See *Briggs v. Dixon*, 4 Moore, 414. *Anon.* 1 Chit. 490, n. And the application to have a cause tried in term, where the rule for a special jury has been obtained for delay, ought to be made to the judge who is to preside at *nisi prius*, and not to the court. *Johnson v. Coke and Gas Light Company*, 7 Taunt. 386. But where an application was made to a judge at chambers to oblige a party to proceed to strike the special jury, and he made an order that the jury should be struck the next day: the court refused to rescind the order. *Joseph v. Perry*, 3 Dowl. 699.

By stat. 6 G. 4, c. 50, s. 25, in all counties, &c., except London and Middlesex, the special jurors shall be summoned three days at least before the day on which they are required to attend. And consequently the special *distringas* or *habeas corpora* must be left at the sheriff's office in sufficient time to have the jurors summoned accordingly. And in the Queen's Bench, the notice for summoning the special jury, in Middlesex, together with the *distringas*, shall be left at the sheriff's office before seven o'clock in the evening next but one before the day on which such jury shall be required to attend, unless such jury shall be required to attend on a Monday, and then before seven in the evening of the preceding Friday; and that all notices of countermand for summoning special juries, shall be left at the said office before twelve o'clock at noon of the



day immediately preceding the day for which such jury was to have been summoned. *R. T. 5 G. 4, K. B.*

On the day of trial, as soon as the cause is called on, the special jurors are called. If twelve appear, they are sworn, and the trial proceeds; if a less number, then either party may pray a *tales*, (see *Snook v. Southwood*, 1 *R. & M.* 429,) and the officer will thereupon call common jurors to make up the number; see 6 *G. 4, c. 50, s. 37*; but where none of the special jurors appeared, and the cause was tried by a common jury, (there being a common jury panel, as well as a special jury, returned,) the trial was set aside. *Holt v. Meadowcroft*, 4 *M. & S.* 467.

If the verdict be in favour of the party who obtained the rule for the special jury, he should immediately after the verdict apply to the judge to "certify upon the back of the record that it was a proper cause to be tried by a special jury;" for unless such certificate be granted, the party will be allowed no more costs on taxation, than if the cause had been tried by a common jury. 6 *G. 4, c. 50, s. 34*. See *Orme v. Crockford*, 1 *Car. & P.* 537. *Waggett v. Shaw*, 3 *Camp.* 316. *Jones v. Tobin*, 4 *Bing. N. C.* 123. Upon this statute it was holden that a defendant was not entitled to such certificate, where the plaintiff was nonsuit; *Wood v. Greenwood*, 10 *B. & C.* 689; but now, the judge may certify for the costs of a defendant's special jury, as well upon a nonsuit, 3 & 4 *W. 4, c. 42, s. 35*, as in the case of a verdict for the defendant.

### 3. *A view, when and how obtained.*

By stat. 6 *G. 4, c. 50, s. 23*, the court or a judge may order, in the *distringas* or *habeas corpora*, that the sheriff shall have six or more of the jurors, returned to try the cause, (who shall be consented to by the parties, or nominated by the sheriff in case the parties cannot agree,) at the place in question, some convenient time before the trial, and that the place in question shall be then and there shown to them, by two persons to be named in the writ, and appointed by the court or judge; and the sheriff shall afterwards, by a special return upon the *distringas* or *habeas corpora*, certify that the view has been had, according to the command of the said writ, and shall specify the names of the viewers. Also, the court or judge, may, if they think fit, require by the rule, that the party applying for it, shall deposit in the hands of the under-sheriff a certain sum of money, for payment of the expenses of the view. *Id.* Where the writ contained the name of one shower only, the court refused to allow the successful party the costs of the view. *Taylor v. Thompson*, 7 *Bing.* 403, 1 *Dowl.* 218.

And now, by R. G. H. 2 W. 4, s. 63, "the rule for a view may in all cases be drawn up by the officers of the court, on the application of the party, without affidavit or motion for the purpose." *See the form of the rule for a view in a common jury case, Arch. Forms, 108, 109; in a special jury case, Id. 108, 109; and of the distringas or habeas corpora thereon, in the Appendix.*

At the trial, the jurors who have taken the view, are the first called, and as many of them as appear must form a part of the jury. The names of others, to make up a full jury, are then drawn in the ordinary way.

#### SECTION VI.

##### The jury.

*Who may be jurors.]* All men between the ages of 21 and 60, having 10*l.* a year in lands or tenements, freehold or copyhold, &c., or in rents out of the same, in fee or for life,—or having 20*l.* a year above reprises in lands, &c. held by lease for twenty-one years, or for years determinable on a life,—or being householders rated to the poor on a value of 30*l.* in Middlesex, or of 20*l.* in any other county,—or occupying a house having fifteen windows,—are qualified to serve on juries. 6 G. 4, c. 50, s. 1. In Wales, the jurors are only required to have three-fifths of the above qualification. *Id.* In London, jurors must be householders, or occupiers of warehouses, counting-houses or shops for trade, and have 100*l.* in lands or personal property. *Id.* s. 50. As to the manner in which jury lists are to be made out, &c., see *Id.* s. 4, &c. All those described in the jurors' list as esquires or of a higher degree, or as bankers or merchants, shall be qualified to be special jurors, and their names shall be put down in the special jurors' list. *Id.* s. 31. As to moving for and striking a special jury, see *ante*, p. 365. A want of qualification is only matter of challenge. *R. v. Sutton*, 8 B. & C. 417.

Jurors on writs of inquiry, in London or any county, must be qualified in the same way as jurors at *nisi prius*; but in other cities, boroughs, &c. they may be of the same description as was usual before the jury act. 6 G. 4, c. 50, s. 52.

The following persons are exempt from serving: peers, judges, clergymen, priests, dissenting clergymen, serjeants and barristers, advocates, attornies, officers of the courts, coroners, gaolers, physicians, surgeons, apothecaries, officers in the army and navy on full pay, pilots, household servants of her Majesty, officers of the customs or excise, sheriffs' officers, high constables and parish clerks. 6 G. 4, c. 50, s. 2.

## SECTION VII.

*The brief.*

The brief at *nisi prius* is intituled in the court and cause. The pleadings are then copied, if special, or the substance shortly stated, if general. Next the "*Case*," is stated, as it will be established by the proofs. And lastly the "*Proofs*" are set out, giving exactly what each witness will say. To this you may add such observations as you may think necessary, on the case or evidence, on the case likely to be made out by the opposite party, the witnesses he will probably adduce in support of it, with hints for their cross-examination, &c.

Upon demurrers, writs of error or special cases, the brief is merely a copy of the demurrer book or paper book, with such observations added as you may think necessary.

The brief, in moving for a rule *nisi*, is often very scanty, frequently nothing more than a mere motion pauper, accompanying the affidavits, and indorsed to move for the rule required; the brief in support of the rule, or in showing cause against it, merely contains copies of the affidavits, and such observations as you may deem necessary.

## SECTION VIII.

*Putting off the trial.*

*In what cases.*] The court will in general put off the trial, on account of the absence of a material witness, if they think the justice of the case requires it. They have even put it off from Easter term until the sittings after Michaelmas, at the instance of a defendant, where it appeared that the witness was not expected to arrive from abroad until that time. *Grierson v. Aird*, 1 *Hodg.* 76, and see *Gardner v. Moses*, 1 *Tawnl.* 118. *Anon.* 1 *Chit.* 730. *Anon.* 2 *Chit.* 411. But where the witness is expected to be absent a great length of time, the court will require a strong case to be made out, to induce them to grant the motion. *Lord v. Cooke*, 1 *W. Bl.* 436. And they will not grant it at all, if the evidence of the witness is to support an unconscionable defence, *Robinson v. Smyth*, 1 *B. & P.* 454, or a plea in abatement, *Wade v. Birmingham*, 2 *Chit.* 5, or the like. They have refused also to do so, where the applicant had delayed the cause unfairly, and the witness was in England when the case might have been tried, were it not for that delay. *Saunders v. Pitman*, 1 *B. & P.* 33. They have refused to put it off, until an indictment for perjury relating to a matter connected with the cause could be tried.

*Johnson v. Wardle*, 1 Har. & W. 219. They have refused it, in an action by assignees of a bankrupt, where it was applied for on the ground that a petition contesting the validity of the commission was then pending. *Anon.* 2 Chit. 411. They have refused it also, where the application was made on the ground that a bill in equity had been filed for an injunction to stay proceedings in the action. *Vandersteegen v. Witham*, 8 Dowl. 369. In the affidavit in support of a first application, on the ground of the absence of a witness, it is not necessary to name the witness, *Smith v. Dobson*, 2 D. & R. 420. *Buckingham v. Banks*, 4 D. & R. 832, or to swear to merits; *Att.-Gen. v. Hull*, 2 Dowl. 111. *Hill v. Prosser*, 3 Dowl. 704; it is sufficient to swear that the witness is material and necessary, and that the party cannot safely proceed to trial without his evidence. *Id.* But if it become necessary to make a second motion on account of the continued absence of the witness, the court may require to know who he is, and what he is to prove, &c. See *Anon.* 1 Chit. 686.

Or if it be necessary to examine witnesses abroad upon interrogatories, the court will put off the trial until the examinations are returned. See *post*, tit. "Witness." And see *Furley v. Newnham*, 2 Doug. 419. *Brown v. Murray*, 4 D. & R. 830.

So, upon an affidavit that a copy of a judicial document in the West Indies was necessary to the defence, the court postponed the trial, and they refused to inquire into the admissibility of it as evidence. *Mackenzie v. Hudson*, 1 D. & R. 159.

And where a libel had been published, at the instance of one of the parties, for the purpose of influencing the jury, the court put off the trial upon the application of the other party. *R. v. Gray*, 1 Burr. 499.

So where there was a demurrer, and also an issue in fact, and the court thought it desirable that the demurrer should be first argued, they put off the trial of the issue. *Burdett v. Coleman*, 13 East, 27.

And an application will be entertained to put off the trial of an issue out of Chancery, as well as in other cases. *Burton v. Lawton*, 4 Camp. 163.

What has now been said, has in general reference to applications by the defendant. But as the plaintiff has the record in his own power, and need not enter it for trial if he be not prepared to try, or may withdraw the record if from the absence of witnesses or other cause it become necessary, the court will not in general entertain a motion by him to put off the trial; nor will the judge at *nisi prius*, unless it be merely to put off the trial from one sitting to another in term, or for a few days during the sittings after term. See *Curtis v. Barker*, 2 Car. & P. 185.

*Application, &c.*] The application must be made either to the court, or to the judge at *nisi prius*; to the court, if practicable under the circumstances. *R. E.* 49 G. 3, *C. P.* and see *Anon.* 3 *Taunt.* 315. On the other hand, motions to regulate the trial of a cause in other respects, must be made to the judge who is to try it. See *Johnson v. The Coke and Gas Company*, 7 *Taunt.* 386. But the trial cannot be put off by the mere consent of parties, *R. M.* 50 G. 3, *C. P.*, without the sanction of the judge at *nisi prius*.

The affidavit on which the application is made, may be made either by the party, or by his attorney in the cause, *Duberley v. Gunning, Peake*, 97, or by the attorney's clerk, if he will swear that he has the management of the cause, and is acquainted with its circumstances. *Sullivan v. Macgill*, 1 *H. Bl.* 637. If the affidavit is to be used at *nisi prius*, a copy of it must be given to the other party a day before, if possible.

If the application be made at *nisi prius*, it is granted only on payment of costs; that is to say, the same costs as if the record were withdrawn. *Walker v. Lane*, 1 *Gale*, 52. If made to the court, and notice of it be not given to the other party, until after he has incurred expenses in bringing up his witnesses, the court will make the payment of such expenses a condition of their granting the rule. *Att.-Gen. v. Hull*, 2 *Dowl.* 211.

#### SECTION IX.

##### Trial at bar.

*In what cases.*] It is wholly in the discretion of the court whether they will grant a trial at bar or not; and their determination in this respect must of course depend upon the circumstances of each particular case. *R. v. Amery*, 1 *T. R.* 363. The circumstances which usually influence them to grant it, are, the great value of the property, the probable length of the trial, and the probable difficulties that may arise in it. See *Holmes v. Brown*, 2 *Doug.* 437. See *Ld. Rivers v. Pratt*, 1 *Brod. & B.* 265. It cannot therefore be moved for, before the parties are at issue; for until then it cannot be known with certainty what is to be tried, or what difficulties are likely to arise; see *Tyndal v. Pennington*, 1 *Ld. Ken.* 128; and in ordinary cases, the court will not appoint a cause to be tried at bar in an issuable term. *Coleman v. City of London*, 2 *Tidd.* 808. In granting it, the court may impose what terms they please upon the party applying. *Holmes v. Brown*, *supra*.

But where the crown is concerned in interest, the attorney-general, as a matter of right, is entitled to a trial at bar, *Brown v. Ld. Granville*, 1 *Har. & W.* 270. *Rowe v. Brenton*, 8 *B. &*

C. 737. *Paddock v. Forrester et al.*, 1 M. & Gr. 583, even in an issuable term.

*How.*] Paper books of the issue are made up, and delivered to the judges, four days at least before the trial. The masters and their clerks act as the officers of the court during the trial. If any point of law arise, the judges may deliver their opinions seriatim; the chief justice or chief baron sums up the case to the jury, the puisne judges assisting him occasionally by reading the evidence, &c.; but it is not usual for the puisne judges to sum up the case to the jury separately, after the chief justice has done it. *MS. B.* 1439—1441. *Trial of the Seven Bishops*, 12 *State Tr.* 426. The other proceedings at the trial are the same as in ordinary cases.

If the verdict be against evidence, there may be a new trial. *Musgrave v. Nevins*, *Ld. Raym.* 1358.

#### SECTION X.

##### *Trial at nisi prius.*

*The order in which causes are tried.*] In London and Middlesex, and on circuit, there is always a list of the causes made out, giving the name of each cause in the order in which it was entered, with the names of the attornies of the respective parties. In London and Middlesex, there is also a written list for each day of the sittings, stating the names of so many of the causes in the printed list as the chief justice or judge at *nisi prius* intends to try in the course of the day. And if the cause be called on in its regular order, and the plaintiff obtain a verdict in the absence of the defendant or the defendant nonsuit the plaintiff in his absence, the court will seldom assist the party by granting a new trial, if the matter happened through his laches, see *Watson v. Reeve et al.*, 5 *Bing. N. C.* 112. *Bland v. Warren*, 6 *Dowl.* 21, unless under particular circumstances, see *Doe v. Appleby*, 10 *Law J.*, 72, *qb.* and then only upon payment of costs. *Id.* In strictness, the fact of a cause being in the written list, is notice to the attornies on both sides that it may be taken at any time of the day; therefore, where a cause had been for several days in that list, and was at length tried out of its order as an undefended cause, in the absence of the defendant's attorney, the court refused to grant a new trial except on payment of costs, particularly as it did not appear at what time counsel was instructed. *Fourdrinier v. Bradbury*, 3 *B. & A.* 328. And the judge has tried a cause in the printed list, which was not in the written list of the day, where there was no substantial defence, and the defendant's counsel and attorney, though unwilling, were ready to

try; and the court in that case refused a new trial, there being no affidavit of merits. *Blackhurst v. Bulmer*, 5 B. & A. 907. But where a cause, which was tenth in the written list of the day, was taken at the sitting of the court, on a representation of the plaintiff's counsel that it was undefended, the court of Common Pleas, upon an affidavit that counsel had been employed to defend it, and that he had come into court for that purpose very shortly after the cause was tried, set aside the verdict and granted a new trial, without an affidavit of merits, and directed the costs to abide the event. *Dorrien v. Howell*, 8 Dowl. 277.

At the assizes, where the county is very large, such as Yorkshire or Lancashire, the causes from each division of the county, according to the residence of the plaintiffs' attorneys, are respectively classed together, forming a list by themselves; and these lists are taken in such order as the judges of the circuit may appoint, which is usually advertised in the public papers, or may be known by application to the town agent of the sheriff of the county.

It may be necessary to mention, that it is discretionary with a judge at *nisi prius*, whether he will try an idle or frivolous cause or not; *Robinson v. Mearns*, 6 D. & R. 26; if indeed he do try it, and the plaintiff recover a legal verdict, it will be no ground for disturbing it. *Id.*

As to the entry of the cause for trial, see *ante*, p. 363. And as to the alteration of the *distringas* and clause of *nisi prius*, where the cause has before been made a remanet, see *ante*, p. 364, and *post*, p. 380.

*Jury called, &c.*] The name of each juryman in the panel, is written on a card, and kept in a box by the associate; and when the jurors are to be called, the associate takes the cards out, one after another, and calls out the names: 6 G. 4, c. 50, s. 26. But where a view has been had, the jurors who had the view must be called first. *Id.* s. 24. The jurors, if in attendance, answer to their names when called, and go into the jury box, until twelve appear. Those who do not appear, may be fined by the judge in such sum as he may think proper, (and in case of a viewer in not less than 10*l.*), unless a reasonable excuse be made upon oath or affidavit; 6 G. 4, c. 50, s. 38, 51. See *Carne v. Nicoll*, 3 Dowl. 115; so a juror summoned and not appearing upon a writ of inquiry, may be fined by the under-sheriff in a sum not exceeding 5*l.* *Id.* s. 53. After a full jury appears, the cause is called on; and the jurors, if not challenged, are then sworn, and the cause proceeds. If any person appear upon the jury, whose name is not in the panel, if he be not objected to during the trial, the court will not on this account set aside the verdict, as for a mistrial; *Hill v. Yates*, 12 East, 229; but where the irregu-

larity had been noticed before verdict, the court set aside the verdict, and awarded a *venire de novo*. *Dovey v. Hobson*, 6 Taunt. 460.

Challenges are either to the whole array, for some default or partiality in the sheriff or under-sheriff—or to the polls, for some objection to particular jurors. *See upon this subject, Co. Lit.* 156, &c. 3 *Bl. Com.* 359. No challenge, however, either to the array or polls, can be made, until a full jury have appeared. *R. v. Edwards*, 4 B. & A. 471. Challenges either to the array or polls, seldom occur in practice at present: if the sheriff be interested, &c., the court upon application will award the *venire* to the coroners, &c.; *see ante*, p. 325; and if there be any objection to any particular jurymen, the associate, upon application of the counsel of either party, will refrain from calling him.

If the trial last more than a day, the judge may allow the jurors to go to their homes or lodgings for the night, cautioning them not to hold communication with the parties or others upon the subject of the trial; *see R. v. Kinnear*, 2 B. & A. 462; indeed if it could be proved that any of the jury had been tampered with in the interim, it might have the effect of avoiding the verdict. *Id.* Also, if during the trial, a jurymen become so ill that he cannot remain, the judge may discharge that jurymen, and order another (consisting of the remaining eleven jurors, and a twelfth from the jury panel) to be sworn. *See R. v. Scalbert*, 2 Leach, 620. *R. v. Edwards, Rus. & R.* 224, 3 Camp. 207, 4 Taunt. 309.

If the jury make any mistake in the delivery of their verdict, it cannot afterwards be set right by any affidavit of the jurors; any explanation upon the subject should be given at the time of the trial. *Jackson v. Williamson*, 2 T. R. 281, *but see Cogan v. Edden*, 1 Burr. 283.

*Case stated.*] The counsel for the plaintiff always opens the case. But it depends upon the nature of the action and of the pleadings as to which party is entitled first to address the jury. In actions for personal injuries, or for libel or verbal slander, the judges have laid it down as a rule in future, that the plaintiff shall in all cases begin, no matter what the pleadings may be. *Carter v. Jones*, 6 Car. & P. 64. *Atkinson v. Warne*, *Id.* 687. But in all other cases the general rule is, that the party who has added the *similiter*, (supposing there to be but one issue), has a right to begin: or if there be two or more issues, then if the plaintiff have added the *similiter* in any one of them, he has a right to begin; but if the defendant have added the *similiter* in all of them, he has the right to begin. Thus, in debt on bond, if the defendant have pleaded *solvit ad diem* only, he must begin, *Sandford v. Hunt*, 1 Car. & P. 118; but if he had also pleaded *non est factum*, the plaintiff would



have a right to begin. So if payment alone be pleaded, *Richardson v. Fell*, 4 Dowl. 10, or coverture only, *Lacon v. Higgins*, 3 Stark. 178, or a justification or justifications only, *Bedell v. Russell*, 1 Ry. & M. 293, and issue be joined upon it, the defendant must begin. A number of cases, illustrative of this will be found in 7 Car. & P. 44, 63, 101, 221, 262, 307, 347, 613, 633. 8 Car. & P. 321, 720. 9 Car. & P. 231, 337, 374, 599, 734. So, in ejectment by heir at law against devisee, &c. the defendant, if he will admit the lessor of the plaintiff to be heir at law, shall begin; or if the lessor of plaintiff claim under a will, and the defendant claim under a codicil to the same will, the defendant, if he will admit the due execution of the will, shall be entitled to begin; *Doe v. Corbett*, 3 Camp. 368; *Doe v. Goslee*, 9 Car. & P. 46. But this is not the case in other actions. *Pontifex v. Jolly*, 9 Car. & P. 202. There are some exceptions however to the rule just now mentioned: where in trespass for breaking and entering a close, the defendant pleaded not guilty as to the *vi et armis*, and justified as to the residue of the trespass, Bayley, J. held that as there was substantially but one plea, (the justification) and issue joined upon it, the defendant should begin. *Jackson v. Hesketh*, 2 Stark. 518. *S. P.*, *Hodges v. Holden*, 3 Camp. 366, and see *Cooper v. Eggington*, 8 Car. & P. 748. *Hoggett v. Exley*, 9 Id. 324. In the trial of issues, that party who has to prove the affirmative of the issue must begin. See *Hudson et al. v. Brown*, 8 Car. & P. 774. At one time it was holden that where the plaintiff had to prove the amount of his damages, he was entitled to begin; see *Robey v. Howard*, 2 Stark. 555; but this has since been ruled otherwise, *Bedell v. Russell*, 1 Ry. & M. 293. *Cooper v. Wakley*, 1 Moody & M. 248, and the practice is now as above mentioned.

One counsel only can address the jury for the plaintiffs, however numerous the plaintiffs may be. Even in ejectment, although there be several lessors of the plaintiff, all separately interested, only one counsel will be allowed to address the jury for all. *Doe v. Bromly*, 6 D. & R. 292. As to defendants, if they defend jointly, it is clear that but one counsel can address the jury for all; and even if they defend separately, by different attorneys, yet if they have in fact the same interest, it has been ruled that but one counsel can address the jury for all; *Chippendale v. Mason*, 4 Camp. 174; but this has since been overruled by the court of Exchequer. *Ridgway v. Phillips et al.*, 3 Dowl. 154.

Formerly it was holden that if, where the plaintiff begins, the nature of the defence appear from the pleadings or from any notice, &c. the plaintiff's counsel was bound to open the whole case, not only the case upon the part of his client, but also with respect to the defence; and that any witnesses he had to disprove the latter, he must call them in the first in-

stance. See *Lacon v. Higgins*, 3 Stark. 178. But the practice is now otherwise: the plaintiff, if he begin, goes through his case, without going into the matter of defence; the defendant then states and proves his defence; and if he give evidence in proof of it, the plaintiff may then call witnesses or give evidence in answer to it, the defendant is entitled to reply upon this evidence, and the plaintiff is then entitled to the general reply. If counsel, in addressing the jury, make use of expressions which may be deemed injurious to individuals, no action will lie against him for doing so; *Hodgson v. Scarlet*, 1 B. & A. 232; but an action may be maintained against any person who afterwards publishes it. *Flint v. Pike*, 6 D. & R. 528.

If, upon the cause being called on, the plaintiff do not appear, the defendant may require him to be called, and nonsuit; but a verdict cannot be taken against him, even although the proof of the issue be upon the defendant, *Alderson v. Shaw*, 3 Bing. 290, or the defendant have taken down the record by proviso. *Ante*, p. 362. If the plaintiff be present, and the defendant not, the plaintiff may go into his case, as if the action were undefended. But if both be present, and the plaintiff be not prepared, if the judge will not put off the trial, the plaintiff, by his counsel or attorney, should withdraw the record; see *Mullings v. —*, 5 Taunt. 88; it may be necessary, however, to state, that merely a retainer, without a brief, will not authorize counsel to withdraw a record. *Ahitbol v. Benedetto*, 3 Taunt. 225.

*Examination, &c. of witnesses.*] The counsel, who first addresses the jury, adduces evidence or calls witnesses to prove the case he has stated. The witnesses are first examined by the counsel for the party calling them, then cross-examined by the counsel of the opposite party, and lastly re-examined (if necessary) by the counsel of the first party. But a person appearing upon a *subpœna duces tecum* and producing a document, without being sworn or examined, cannot be cross-examined. *Davis v. Dale*, *Moody & M.* 514. *Evans v. Moseley*, 2 Dowl. 364. *Rush v. Smith*, 1 Cr. M. & R. 94. As to the examination, cross-examination and re-examination of witnesses, see *Arch. Pl. & Ev.* 481, 485, 488. Where there are several counsel for one party, the leader may, if he will, interpose, and take the examination out of the hands of his junior. *Doe v. Roe*, 2 Camp. 280. Where there are several defendants, each defending separately by different attorneys, the counsel for each is entitled to cross-examine the plaintiff's witnesses. *Ridgway v. Philip et al.*, 1 Cr. M. & R. 415. If an objection is to be made to the competency of a witness, it should in strictness be made when the witness appears, and he may

be examined as to it upon the *voire dire* ; but if this be not done, you cannot afterwards call another witness to prove the incompetency. *Dewdney v. Palmer*, 4 Mees. & W. 664. *Hartshorn v. Watson*, 8 Law J., 299.

*Defence.*] After the counsel, who first addressed the jury, has closed his case, the leading counsel for the opposite party then addresses the jury in his turn, and either contents himself with remarking upon the case made out by his opponent, or states his client's case, and calls witnesses or adduces other evidence to prove it. Sometimes in actions *ex delicto* against two or more, if the plaintiff fail to give evidence against one of the defendants, his co-defendants may apply to have him acquitted, in order to avail themselves of his testimony; and the judge will accordingly order it, even before the defendants have entered upon their defence. *Arch. Pl. & Ev.* 471.

*Reply.*] If the second party, who has addressed the jury, call witnesses, the other party will be entitled to the general reply; or if he call witnesses in reply, as mentioned *ante*, p. 377, the counsel for such second party may then observe upon such evidence, confining his observations strictly to the evidence in reply, and the counsel for the first party will then be entitled to the general reply.

*Summing up.*] After the case is closed on both sides, the judge sums up the evidence to the jury, making such remarks upon it as he may think fit, and stating to them the law upon the subject. In cases of consequence, it may be prudent for the attorney, who attends the trial of the cause, to take notes of this summing up, and indeed of the evidence, and what passes at the trial, altogether.

*Withdrawing a juror, &c.*] It often happens, either from a doubt whether the action will lie, or from a feeling that under the peculiar circumstances of the case, the action should not be proceeded in, that the judge at the trial recommends the parties to withdraw a juror. If the parties consent to it, one of the jurors is desired to withdraw from his fellows, and then the rest of the jury are discharged from giving a verdict. See the form of the *postea* in such case, *Arch. Forms*, 128. Each party pays his own costs. *Stodhart v. Johnson*, 3 T. R. 657. Withdrawing a juror, however, has not the effect of putting an end to the action. See *Saunderson v. Nestor*, 1 Ry. & M. 400. *Thomas v. Lewis*, 5 Dougl. 395; but if from circumstances it appear that it was the intention of the parties thereby to put an end to the action, if the plaintiff afterwards either continue the same action, or bring another for

the same cause, the court upon application will stay the proceedings, deeming the withdrawing of the juror equivalent to an undertaking by the plaintiff not to proceed further in the matter. *Moscato v. Lawson*, 1 Har. & W. 572. So, discharging a jury without giving a verdict, because they cannot agree upon it, or for other cause, has the same effect as withdrawing a juror, and does not terminate the suit; and where a plaintiff, in such a case, instead of afterwards proceeding in the same action, brought a new action for the same cause, the court on application stayed the proceedings, but refused the defendant his costs in the latter suit. *Everett v. Youells*, 3 B. & Ad. 349.

*Nonsuit, verdict, &c.*] As to nonsuit, *see post*, p. 401. A nonsuit for variance, is not by any means so usual now as formerly, the judge having now in most cases the power of amending the record at the trial. It is very usual at the trial, where it is doubtful whether the action will lie, for the judge, after taking the opinion of the jury as to the amount of damages, and as to any other facts he may think necessary, either to nonsuit the plaintiff, giving him leave to move to set aside the nonsuit and enter a verdict,—or to direct a verdict for the plaintiff, with leave to the defendant to move to set aside the verdict and enter a nonsuit. *See Treacher v. Hinton*, 4 B. & A. 413, *and post*, *tit. "New trial."* Without such leave, however, neither of these motions can be made. *Id.*

If the cause last more than a day, in civil cases, and even in cases of misdemeanor, the jury at night are allowed to retire to their homes or lodgings, the judge usually cautioning them not to hold communication with any person on the subject of the action. *See R. v. Kinneir*, 2 B. & A. 462.

If the jury cannot agree upon their verdict, the judge may discharge them; and he usually does so, after they have been one night locked up in the jury room, deliberating upon their verdict. He cannot, however, instead of thus discharging the jury, nonsuit the plaintiff, without his consent. *Dewar v. Purday*, 1 Har. & W. 227, 4 Nev. & M. 633. Discharging the jury, thus, has the same effect as withdrawing a juror, and does not put an end to the action; and where a plaintiff, in such a case, instead of afterwards proceeding in the same action, brought a new action for the same cause, the court on application stayed the proceedings, but refused the defendant his costs in the latter suit. *Everett v. Youells*, 3 B. & Ad. 349. Where a jury are discharged, the party ultimately succeeding will not be entitled to the costs of that trial. *Seally v. Powis*, 1 Har. & W. 118. *Waite v. Spurgin*, 4 Dowl. 575. *Harrison v. Bennett*, 1 Cr. & M. 203.

As to the verdict generally, *see post*, p. 402; and as to damages, *see post*, p. 404. The judge at the trial will not compel

the plaintiff to elect on what counts he will take the verdict. *Ferguson v. Clarke*, 2 Stark. 442.

As to applying for the costs of a special jury, see *ante*, p. 368.

And as to applying for the judge's certificate, (where the verdict in assumpsit, debt or covenant is under 20*l.*.) that the cause was fit to be tried at *nisi prius*, in order to obtain the larger costs given in other causes at *nisi prius*, see vol. 2, tit. "Costs."

*Certificate for immediate execution.*] By stat. 1 W. 4, c. 7, s. 2, in all actions brought in the courts of law at Westminster, "it shall be lawful for the judge before whom issue joined in any such action shall be tried, in case the plaintiff or demandant therein shall become nonsuit, or a verdict shall be given for the plaintiff or demandant, defendant, or tenant, to certify under his hand on the back of the record, at any time before the end of the sittings or assizes, that in his opinion execution ought to issue in such action forthwith, or at some day to be named in such certificate, and subject or not to any condition or qualification, and in case of a verdict for the plaintiff, then either for the whole or for any part of the sum found by such verdict."

The application for this purpose is usually made by counsel, immediately after the verdict is delivered; and it is imprudent to defer it, at least for any great length of time, as the circumstances of the case may not then be fresh in the recollection of the judge, and there may consequently be a risk of having the application refused. It is seldom made on the part of a defendant, and it is only under very peculiar circumstances that a judge would certify in such a case. And upon the part of a plaintiff, this certificate is usually granted only in actions upon bills of exchange or promissory notes, for goods sold, work and labour, money lent, paid, or had and received, and the like; and it is never granted in cases where a material point has arisen at the trial, and upon which it is fair the defendant should have an opportunity to take the opinion of the court. Where such a certificate for execution is given, it does not prevent the defendant from moving for leave to enter a suggestion on the roll, under a court of requests act, to deprive the plaintiff of costs, at any time before the expiration of the usual time for moving for a new trial. *Badley v. Oliver*, 1 Crompt. & M. 219.

*Remanet.*] Where the cause is made a remanet, in Middlesex or London, it is not necessary to repass the record, but the day of the teste and return of the *distringas* must be altered, both in the writ itself, and in the last paragraph of the *nisi prius* record, (see *ante*, p. 364), before the cause is

again entered for trial; otherwise it cannot be tried. And it is not necessary to have a judge's order for this alteration. *Wells v. Day*, 8 Ad. & El. 941.

## SECTION XI.

*Trial before the sheriff, &c.*

*In what cases.*] By stat. 3 & 4 W. 4, c. 42, s. 17, "in any action depending in any of the superior courts for any debt or demand, in which the sum sought to be recovered and indorsed on the writ of summons shall not exceed 20*l.*, it shall be lawful for the court in which such cause shall be depending, or any judge of any of the said courts, if such court or judge shall be satisfied that the trial will not involve any difficult question of fact or law, and such court or judge shall think fit so to do, to order or direct that the issue or issues joined shall be tried before the sheriff of the county where the action is brought, or any judge of any court of record for the recovery of debt in such county; and for that purpose a writ shall issue, directed to such sheriff, commanding him to try such issue or issues by a jury, to be summoned by him, and to return such writ, with the finding of such jury indorsed, at a day certain in term or vacation to be named in such writ; and thereupon such sheriff or judge shall summon a jury, and shall proceed to try such issue or issues."

The statute relates only to debts and pecuniary demands, and not to torts; and therefore where, in an action for running down a ship, the plaintiff obtained an order for a writ of trial under this act, and was nonsuit at the trial, the court at his own instance set aside the nonsuit, holding that the trial was coram non judice. *Watson v. Abbott*, 2 Dowl. 215. So, in case against a carrier for non-delivery of goods, which was tried before the sheriff, the court held the trial to be altogether a nullity, although the order for the trial was made with the consent of both parties. *Smith v. Brown*, 2 Mees. & W. 851. So, assumpsit for unliquidated damages, cannot be tried before the sheriff; such for instance as for the wrongful dismissal of a servant before the time for which he had hired had expired, *Lismore v. Beadle*, 11 Law J., 153, *qb.*, 1 Dowl. N. C. 566. *Jacquot v. Boura*, 5 Mees. & W. 155, or for not returning a carriage, &c. hired, *Collis v. Broome*, 11 Law J., 60, *cp.* S. C. *nom.* *Collis v. Groom*, 1 Dowl. N. C. 496, or upon an implied promise by the tenant of a farm to consume all the hay upon it, *Lawrence v. Wilcock*, 11 Ad. & El. 941, or for special damage to an outgoing tenant, by the incoming tenant not paying rent according to his agreement, *Jones v. Thomas*, 11 Law J., 154, *qb.*, or the like, even although both parties consent to it. *Lis-*

*more v. Beadle, supra.* But an action to recover the price paid for a horse which had been returned on account of its not agreeing with the warranty, *Allen v. Pink*, 4 Mees. & W. 140, or an action in substance for the price of a horse, though special in form, *Price v. Morgan*, 2 Id. 53, or an action of detinue for a chattel, *Walker v. Lee et al.*, 11 Law J., 58, cp., are within the act. The court also feel a great disinclination to set aside a verdict or nonsuit at the instance of the party who obtained the order for the writ of trial, merely on the alleged ground that the case is not one which could have been legally tried before the sheriff. *Price v. Morgan*, and *Walker v. Lee, supra.* Where the debt was exactly 20*l.* and the jury found a verdict for that sum, and also 10*s.* for interest, the court doubted whether this could be done, and suggested to the plaintiff to enter *remittitur* for the excess; which he accordingly did. *Burleigh v. Kingdom*, 2 Cr. & M. 476. Where the writ was sued out and indorsed for 25*l.* but as 15*l.* only was due, the plaintiff applied to a judge for an order for a writ of trial, who granted it, ordering at the same time the writ to be altered from 25*l.* to 15*l.*: but the court, upon application, rescinded the order, holding that as the action was originally brought for a sum above 20*l.* the judge had no authority to make the order, even although the plaintiff offered to waive part of his claim. *Trotter v. Bass*, 1 Hodg. 23. And see *Edge v. Shaw et ux.*, 2 Cr. M. & R. 415.

*Order and issue.*] The order is obtained, almost as of course, upon production of the writ of summons and declaration; and the judge has no power to annex any condition in his order, such as that the case shall be tried within a certain time, or the like. *Wright v. Skinner*, 2 Cr. M. & R. 746. See *Blissett v. Tenant*, 6 Dowl. 436, *semb. cont.* The issue is then made up and delivered, with a notice of trial indorsed on it, as in ordinary cases. The form of the issue is also the same as in ordinary cases, to the joinder of issue inclusive; but by R. G. H. 4 W. 4, r. 2, sch. No. 5, the conclusion of it must be thus:—

“And forasmuch as the sum sought to be recovered in this suit, and indorsed on the said writ of summons, does not exceed twenty pounds; hereupon on the [the teste of the writ of trial] day of —, in the year —, pursuant to the statute in that case made and provided, the sheriff, [or, the judge of — being a court of record for the recovery of debt in the said county, as the case may be,] is commanded that he summon twelve, &c. who neither, &c. who shall be sworn truly to try the issue above joined between the parties aforesaid, and that he proceed to try such issue accordingly, and when the same shall have been tried, that he make known to the court here what shall have been done,

by virtue of the writ of our Lady the Queen to him in that behalf directed, with the finding of the jury thereon indorsed, on the — day of —," &c. See *Wilson v. Nesbitt*, 11 Law J., 206, cp.

Where the issue, instead of concluding thus, concluded with an award of a venire, in the ordinary form of an issue at *nisi prius*, the court upon application set it aside. *Peel v. Ward*, 5 Dowl. 169. But the court in such a case will give the plaintiff leave to amend, upon payment of costs. *Atwill v. Baker*, 5 Dowl. 462. So, where there is any omission in the issue, which is not material to the merits, as the day of the teste or return of the writ of trial, *Watts v. Ball*, 1 Man. & Gr. 208. *Hiam v. Smith*, 6 Dowl. 710, or a variance between it and the writ in a matter not material, *Farwig v. Cockerton*, 3 Mees. & W. 169, the court will allow it to be amended on payment of costs. But the plaintiff cannot amend it himself, without such leave: and therefore where the issue did not state the issuing of the writ of summons, but the plaintiff inserted it in the writ of trial, and at the trial the defendant protested against it and refused to enter upon his defence, the court set aside the verdict. *Wright v. Skinner*, 4 Bing. N. C. 746. Where, however, there is an omission or mistake in the issue, the proper course is for the defendant to return it; the court will not grant a new trial on that ground. *Cooze v. Neumegen*, 9 Mees. & W. 290.

As to judgment as in case of nonsuit, see *ante*, p. 347.

*Writ of trial.*] The next step is to prepare the writ of trial. This must be engrossed on parchment, and must be sealed, but not signed. *R. G. H. 4 W. 4, r. 1, s. 19*. The following is the form of the writ, as given by *R. G. H. 4 W. 4, r. 2, sch. No. 5*.

"Victoria by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith, To the sheriff of our county —, [or, to the judge of — being a court of record for the recovery of debt in our county of — as the case may be:] Whereas, John Nokes in our court before our justices at Westminster, [or in B. R. before us at Westminster, or in the Exchequer, before the barons of our Exchequer at Westminster, as the case may be,] on the [the date of the first writ of summons] day of — last, impleaded Joseph Styles in an action on promises, [or as the case may be.]

"For that whereas, [reciting the declaration, as in a writ of inquiry,] and thereupon he brought suit.

"And whereas the defendant, on the — day of — last, by — his attorney, [or as the case may be,] came into our said court and said [here recite the pleas and pleadings to the joinder of issue,] and the plaintiff did the like. And whereas



the sum sought to be recovered in the said action, and indorsed on the writ of summons therein, does not exceed 20l., and it is fitting that the issue above joined should be tried before you the said sheriff of — [or judge, as the case may be:] We, therefore, pursuant to the statute in such case made and provided, command you, that you do summon twelve free and lawful men of your county, duly qualified according to law, who are in no wise akin to the plaintiff or to the defendant, who shall be sworn truly to try the said issue joined between the parties aforesaid, and that you proceed to try such issue accordingly; and when the same shall be tried in manner aforesaid, we command you that you make known [in C. P. to our justices at Westminster, or in B. R. to us at Westminster, or in the Exchequer, to the barons of our said Exchequer, as the case may be,] what shall have been done by virtue of this writ, with the finding of the jury hereon indorsed, on the — day of — next. Witness Sir Nicholas Conyngham Tindal, Knight, at Westminster, the — day of — in the — year of our reign."

There is an omission in the statute, where it speaks of the manner in which the writ of trial is to be directed; the statute stating that the writ is to be directed to the sheriff, omitting the words "or judge." But it has been holden that where the judge's order directs the trial to be before the judge of an inferior court of record, the writ of trial must be directed to that judge; and therefore, where the writ was directed to the mayor of Colchester, (the mayor being judge of such a court), it was holden to be correct. *Clark v. Marner*, 2 Dowl. 774. Where the writ was directed to the recorder of a borough, commanding him to summon a jury of his county, and the case was tried by a jury of the borough: the court set aside the verdict, thinking the writ bad, as directing a jury of the county to be summoned, but at all events, the trial not being before the jury in the writ mentioned, was a mistrial, and bad. *Farmer v. Mountfort*, 8 Mees. & W. 266. A new writ afterwards directed him to summon a jury of the borough, and that was holden good. *Farmer v. Mountfort*, 9 Mees. & W. 100.

Where the writ of trial, by mistake, stated the date of the declaration as the day of the teste of the writ of summons, it was holden to be fatal, and that the writ was thereby void; and the court set aside a verdict for plaintiff upon this ground, although the objection had not been made at the trial. *Wight v. Perrers*, 5 Dowl. 463. And the writ of trial is conclusive as to the date of the writ of summons, and no evidence can be given to contradict it. *Whipple v. Manley*, 1 Mees. & W. 432. The court, however, upon application, will amend it, and grant a new trial, if any injustice have been occasioned by it. *Id. White v. Farrer*, 2 *Id.* 288. In general, however, the court will not set aside a verdict for defects in the writ, where the

defendant has appeared at the trial and made no objection to it; but they will order the writ to be amended, and make the plaintiff pay the costs of the amendment. *Emery et al. v. Howard*, 9 Mees. & W. 108. *Percival v. Connell*, 3 Bing. N. C. 877. But where the writ omitted to state the amount of the debt, the court even arrested the judgment. *Handford v. Handford*, 6 Dowl. 473.

*Notice of trial, &c.*] The same notice of trial must be given as in causes to be tried at *nisi prius*. See *Dignam v. Mostyn*, 6 Dowl. 547. It must however specify the day of trial. *Farmer v. Mountfort*, 9 Mees. & W. 100. And where notice was given for Easter Tuesday, and afterwards continued to a subsequent day, Williams, J. held that Easter Tuesday was not a *dis non* with respect to notices of trial, and that the notice therefore was sufficient. *Carnock v. Smith*, 3 Dowl. 607, 1 Har. & W. 217. Where notice was given for twelve o'clock, and when the defendant's attorney attended at the court house, with his witnesses, a quarter before twelve on the day appointed, he found the cause had already been tried: the court set aside the verdict, without requiring any affidavit of merits. *Hanslow v. Wilkes*, 4 Dowl. 295.

Where notice of trial was given and countermanded, and afterwards a new notice was given, and the cause tried: it was objected that the writ of trial in such case ought to have been re-sealed; but Parke, B., held that it was not necessary to re-seal the writ, where the trial takes place before the return day; it appearing afterwards however that the return day had been altered from the 12th to the 19th, and that the trial took place on the 17th, the verdict was set aside. *Chandler v. Besward*, 2 Mees. & W. 205.

*Trial.*] Where an application to put off the trial was not made until after the jury had been sworn in the cause, the court held it to be too late; *Packham v. Newman*, 1 Cr. M. & R. 584; such an application ought to be made to a judge of one of the superior courts. *Per Alderson, B. Id.* Care must be taken that the trial is had before the writ is returnable. See *Mortimer v. Preedy*, 3 Mees. & W. 602. Where however the writ was returnable on the 27th, and the trial began on the 26th, lasted the whole of the 27th, and the verdict was not delivered until after twelve o'clock at night, the court refused to set aside the verdict. *Petier v. Booth*, 1 Dowl. N. C. 545. *Pinkney v. Brött*, 11 Law J., 9, *qb*.

The trial ought to be conducted in the same manner as a cause at *nisi prius*. And the court of exchequer held that the sheriff was warranted in laying down a rule, that none but a barrister or an attorney should act as advocate for either party. *Tribe v. Wingfield*, 2 Mees. & W. 128. Also by stat. 3 & 4 W.

4, c. 42, s. 18, the sheriff or judge shall have the same authority as to amendments, as is given by that act to judges at nisi prius. See "*Amendment.*" *Hill v. Salter*, 2 Dowl. 380. The sheriff or judge may also nonsuit the plaintiff; *Per Bayley, B. in Watson v. Abbot*, 2 Cr. & M. 150; but he must dispose of the case in some such manner; he cannot delegate his authority to an arbitrator, by allowing a verdict to be taken subject to an award. *Wilson v. Thorpe*, 6 Mees. & W. 721. He may also certify for immediate or speedy execution, as a judge at nisi prius may, under stat. 1 W. 4, c. 7, s. 2, and judgment may be signed and execution issued accordingly. 3 & 4 W. 4, c. 42, s. 19. And see *Pyke v. Glendinning*, 2 Dowl. 611. But he has no power to certify, under stat. 43 Eliz. c. 6, to deprive a plaintiff of costs where the verdict is for less than 40s.; *Wardroper v. Richardson*, 3 Nev. & M. 839. *Jones v. Barnes*, 2 Mees. & W. 313. And see title "*Costs*;" the application for that purpose must be made to the court. *Johnson v. Beale*, 5 Mees. & W. 276.

The sheriff is to return the writ of trial, with the finding of the jury thereon indorsed, at a day certain in term or vacation to be named in such writ. *Ante*, p. 381. The following are the forms of the indorsement, as given in R. G. H. 4 W. 4, r. 2, sch. Nos. 6, 7.

Form of indorsement on the writ of the verdict :

"*Afterwards on the [day of trial] day of — in the year — before me, sheriff of the county of — [or judge of the court of —] came, as well the within-named plaintiff, as the within-named defendant, by their respective attornies within-named, [or as the case may be,] and the jurors of the jury, by me duly summoned as within commanded, also came, and being duly sworn to try the said issue within-mentioned, on their oath say that —.*" R. G. H. 4 W. 4, r. 2 sch. No. 6.

Form of indorsement, in case a nonsuit takes place :

After the words "duly sworn to try the issue within-mentioned," proceed as follows : "*And were ready to give their verdict in that behalf, but the said John Nokes being solemnly called, came not ; nor did he further prosecute his said suit against the said Joseph Styles.*" R. G. H. 4 W. 4, r. 2, sch. No. 7.

As to moving for a new trial, see "*New Trial.*" If the undersheriff or judge refuse to give a copy of his notes of the trial, when required for the purpose of any motion in the court above, the court will compel him to pay any costs or expenses the party may have been put to, in consequence of his refusal. *Metcalf v. Parry*, 2 Dowl. 589, and see S. C. 3 Dowl. 93.

*Judgment and execution.*] At the return of the writ of trial, "costs shall be taxed, judgment signed, and execution issued forthwith, unless the sheriff or his deputy, before whom such trial shall be had, shall certify under his hand upon such writ, that judgment ought not to be signed until the defendant shall have had an opportunity to apply to the court for a new trial, or a judge of any of the superior courts shall think fit to order that judgment or execution shall be stayed till a day to be named in such order." 3 & 4 W. 4, c. 42, s. 18. See *Angel v. Ihler*, 5 Mees. & W. 600. It is not necessary in this case, to wait four days, after the return of the writ, before you tax costs; but you may tax them, sign judgment and sue out execution, on the very day the writ is returned, *Nicholls v. Chambers*, 1 Cr. M. & R. 385, unless prevented by certificate or order, as above mentioned.

The following is the form of the entry on the judgment roll, as given by R. G. H. 4 W. 4, r. 2, sch. No. 8.

Copy the issue, and then proceed as follows: "*Afterwards on the [day of signing judgment] day of — in the year — came the parties aforesaid by their respective attornies aforesaid, [or as the case may be,] and the said sheriff [or judge, as the case may be,] before whom the said issue came on to be tried, hath sent hither the said last mentioned writ, with an indorsement thereon, which said indorsement is in these words; to wit: [here copy the indorsement.]*"

*Therefore it is considered"* [&c. in the same form as in ordinary cases.]

## SECTION XII.

### *Documentary evidence.*

*Proof of documents.*] Public statutes are never proved; but if any part of your case depend upon a public statute, it may be prudent for you to have a copy of it in court, to aid the recollection of the judge, if necessary. A private statute is proved by an examined copy from the roll. *Arch. Pl. & Ev.* 388—390. As to what statutes are public, what private, see *Arch. Pl. & Ev.* 391.

Records of the Queen's courts, are proved by examined copies. *Arch. Pl. & Ev.* 390. In what cases a former verdict or judgment is evidence, and for or against whom, see *Id.* 393, 4. In what cases the nisi prius record is evidence, see *Id.* 392. A judgment of the House of Lords, a record of an indictment, and a conviction before a magistrate, are likewise

proved by examined copies. *Id.* 395. So is a writ, if it be returned; but if it be not, it must be produced. *Id.* 394.

A fine is proved by the chirograph; *Id.* 395; a recovery, by an examined copy or an exemplification, usually the latter. *Id.* 396.

Proceedings in parliament are proved by examined copies; *Id.* 396; so are the proceedings in courts of equity, (bill, answer, depositions, and decree), *Id.* 397—399, proceedings in the Ecclesiastical courts, *Id.* 401, and proceedings in the Admiralty court. *Id.* 402.

Proceedings in courts of law, not being records: rules of court are proved by office copies; *Id.* 400; a judge's order, by producing the order and proving the judge's signature, or by producing an office copy of a rule by which it has been made a rule of court. *Id.* 400.

Commissioners of bankrupt, adjudications, assignments and certificates, before the late Bankrupt Court Act (1 & 2 W. 4, c. 56), and flats in bankruptcy, adjudications, appointments of assignees and certificates since that act, are proved by producing them, first having them duly enrolled at the Bankrupt office, and a certificate of the enrolment indorsed thereon. 6 G. 4, c. 16, s. 96. 2 W. 4, c. 114, s. 9.

Proceedings in the Insolvent court, (petition, schedule, order of adjudication, &c.) may be proved by an office copy, under the seal of the court, signed by the officer in whose custody the proceedings are, certifying the same to be a true copy. 7 G. 4, c. 57, s. 76. See *Arch. Pl. & Ev.* 405.

Proceedings in foreign courts are proved usually by exemplifications under the seal of the court. *Id.* 406.

Registers of baptism, marriage, or burial, are proved by examined copies. *Id.* 409, 410.

A deed is proved by the attesting witness, if he be alive, in this country, and can be found; and if not, then by proof of his handwriting. *Id.* 418—423. A deed thirty years old, however, proves itself; *Id.* 420; and a deed enrolled, is proved, not by the subscribing witness, but by the certificate of enrolment indorsed on it. *Id.* 419, 396. Care must be taken that the deed be properly stamped, otherwise it cannot be received in evidence. See *Id.* 425—431. 55 G. 3, c. 184, & *sch.*

A will of freehold land must be produced, and proved by one at least of the two witnesses to it, who must at the same time be prepared to prove every circumstance attending the attestation required by the stat. 1 Vict. c. 26, s. 9, *Arch. Pl. & Ev.* 432—434. A will of personal property is proved by the probate. *Id.* 401.

All written instruments not under seal, (agreements, bills of exchange, promissory notes, &c.) are proved by the at-

testing witness, if there be one; otherwise by proof of the party's handwriting. *Id.* 434.

*Copies.*] An examined copy is thus obtained: bespeak a copy from the officer who has the custody of the record, &c.; and when it is ready, let him read over the original, whilst you examine the copy. It is not necessary that he should also read over the copy whilst you examine the record. *Rolf v. Dart*, 2 *Taunt.* 470. Then make a short memorandum on the back of it, as to the time when you examined it, in order that you may be able to swear to it afterwards.

An office copy (that is, a copy made out by the officer in whose hands the original document is, without being examined), is only evidence in those cases, where by statute, or by the practice of the court, &c., it is his duty to make out copies for the parties,—such for instance as an office copy of a rule of court, or the chirograph of a fine, &c.—in which case the copy may be given in evidence without further proof; but if it in strictness form no part of the officer's duties to make out such copies, although in fact he do make them for the convenience of parties and their solicitors, such copies are no evidence, unless proved to have been examined with the originals. *Gilb. Ev.* 23. *Arch. Pl. & Ev.* 391. Such a copy, issued by a court abroad, is clearly not evidence. See *Brown v. Thornton*, 6 *Ad. & El.* 185.

*Notice to produce.*] If you wish to give in evidence any deed, agreement or other written document (not being a mere notice), which is in the hands of the opposite party, or of his attorney or agent, you may give him or his attorney notice to produce it at the trial; and if he fail to do so, you will be allowed to give secondary evidence of it, such as a counterpart or copy, or even parol evidence of its contents. *Arch. Pl. & Ev.* 382, &c. If he produce it, however, you must be prepared to prove it by the attesting witness, if there be one, unless the party so producing it claim or take some estate or interest under it. *Id.* 421. The notice may be in the following form:—

*In the* [ &c.

*Between* [ &c.

*Take notice, that you are hereby required to produce to the court and jury, on the trial of this cause, [a certain deed, dated, " &c." and made between, " &c. describing the deed or other instrument, letters, papers, books, &c. that you desire the opposite party to produce in evidence"] and all other letters, books, papers and writings whatsoever, in anywise re-*

lating to the matters in question in this cause. Dated this — day of —, 18 .

Yours, &c. C. D.

[Defendant's] attorney ["or" agent.]

To Mr. A. B. the above-named [plaintiff]  
or to Mr. E. F. his attorney ["or" agent.]

Make a duplicate of this notice before you serve it, and indorse upon it the time of service, in order that you may swear to it afterwards upon the trial. It must be served upon the attorney of the opposite party; and care must be taken to serve it such a reasonable time before the trial, that the opposite party or his attorney may have an opportunity to search for or procure the instrument required, and produce it at the trial, if he think proper to do so; otherwise you will not be permitted to call for the instrument at the trial, or to give secondary evidence of it, if not produced. *Arch. Pl. & Ev.* 384, and see the several cases there mentioned. See also *George v. Thompson*, 4 Dowl. 656. *Atkins v. Meredith*, *Id.* 568. *Hott v. Miers*, 9 Car. & P. 191. *Firkin v. Edwards*, *Id.* 478. *Gibbons v. Powell*, *Id.* 634. *Foster v. Pointer*, *Id.* 718. *Hughes v. Budd*, 8 Dowl. 315. *Howard v. Williams*, 11 Law J., 279, *ex.*

*Judge's order to admit documents, without proof.*] 1. It is ordered by R. G. H. 2 W. 4, r. 6, "that the expense of a witness, called only to prove the copy of any judgment, writ or other public document, shall not be allowed in costs, unless the party calling him shall, within a reasonable time before the trial, have required the adverse party, by notice in writing, and production of such copy, to admit such copy, and unless such adverse party shall have refused or neglected to make such admission."

2. It is ordered by R. G. H. 2 W. 4, r. 7, "the expense of a witness, called only to prove the handwriting to, or the execution of, any written instrument stated upon the pleadings, shall not be allowed, unless the adverse party shall, upon summons before a judge a reasonable time before the trial, (such summons stating therein the name, description, and place of abode of the intended witness), have neglected or refused to admit such handwriting or execution, or unless the judge upon attendance before him shall indorse upon such summons that he does not think it reasonable to require such admission."

3. By the two preceding rules, the party succeeding at the trial is deprived of the costs of proving documents, unless he have previously applied to the other party to admit them. But by the following rule, a party refusing to admit docu-

ments, may be rendered liable to the costs of proving them, whatever may be the result of the trial. By R. G. H. 4 W. 4, r. 1, s. 20, "either party, after plea pleaded, and a reasonable time before trial, (*see Tinn v. Billingsley et al.*, 2 Cr. M. & R. 253,) may give notice to the other, either in town or country, in the form hereto annexed, or to the like effect, of his intention to adduce in evidence certain written or printed documents, and unless the adverse party shall consent, by indorsement on such notice within forty-eight hours, to make the admission specified, the party requiring such admission, may call on the party required, by summons, to show cause before a judge why he should not consent to such admission, and in case of refusal be subject to pay the costs of proof. And unless the party required shall expressly consent to make such admission, the judge shall, if he think the application reasonable, make an order that the costs of proving any document specified in the notice, which shall be proved at the trial to the satisfaction of the judge or other presiding officer, certified by his indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause." *See Smith v. Bird*, 3 Dowl. 641, 1 Hodg. 96. *Tinn v. Billingsley et al.*, 2 Cr. M. & R. 253. If the witness prove nothing else on the trial on his direct examination, but what has been refused thus to be admitted, although on his cross-examination and re-examination he may have spoken as to facts, the judge will in general certify for costs. *Stracey v. Blake*, 7 Car. & P. 404. And the party thus obtaining a certificate, will be entitled to his costs, although the verdict or nonsuit be afterwards set aside; *Lewis v. Howell*, 6 Ad. & El. 769; but he will not be allowed to tax them, pending the rule for the new trial, &c. *Doe v. Davies*, 12 Ad. & El. 21. The rule above mentioned extends as well to documents in the hands of third parties, as to those in possession of the party requiring the admission; but they must be described accordingly. *Rutter v. Chapman*, 11 Law J., 178, ex. 1 Dowl. N. C. 118. Where the order was consented to, and it specified a counterpart of a lease, but when the instrument was produced at the trial, it purported to be executed both by the landlord and by the tenant, although it was stamped only as a counterpart; the court held the mistake not to be material. *Doe v. Smith*, 8 Ad. & El. 255. So, where the notice to admit, specified a note dated the 10th October, and the note when produced appeared to be dated the 10th November, but the party admitting it had actually seen the note; the mistake was holden immaterial. *Field v. Hemming*, 7 Car. & P. 619. The following is the form of the notice:—

In the [&c.

Between [&c.

Take notice, that the plaintiff [or defendant] in this cause,



proposes to adduce in evidence the several documents hereunder specified, and the same may be inspected by the defendant [or plaintiff] his attorney or agent, at ———, on ——— between the hours of ———; and that the defendant [or plaintiff] will be required to admit that such of the said documents as are specified to be originals, were respectively written, signed or executed, as they purport respectively to have been; that such as are specified as copies, are true copies; and such documents as are stated to have been served, sent or delivered, were so served, sent or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in this cause. Dated [&c.

G. H. attorney or agent for plaintiff.

To E. F. attorney or agent for defendant.

Here describe the documents; the manner of doing which may be as follows:—

#### ORIGINALS.

Description of the Documents.	Date.
Deed of Covenant between A. B. & C. D., 1st part; and E. F. 2nd part.....	1 Jan. 1828.
Indenture of lease from A. B. to C. D. ....	1 Feb. 1828.
Indenture of release between A. B. & C. D. 1st part, &c. ....	2 Feb. 1828.
Letter, defendant to plaintiff ..	1 Mar. 1828.
Policy of insurance upon goods by ship <i>Isabella</i> , on voyage from Oporto to London .....	3 Dec. 1827.
Memorandum of agreement between C. D., captain of said ship, and E. F. ....	1 Jan. 1828.
Bill of exchange for £100, at 3 months, drawn by A. B. on and accepted by C. D., and indorsed by E. F. & G. H. ....	1 May, 1829.

## COPIES.

Description of Documents.	Date.	Original or duplicate, served, sent, or delivered, where, how, and by whom.
<i>Register of baptism of A. B., in the parish of X. ....</i>	} 1 Jan. 1808.	
<i>Letter, plaintiff to defendant ..</i>	} 1 Feb. 1838.	} Sent by the gen. post, 2 Feb. 1838
<i>Notice to produce papers.....</i>	} 1 Mar. 1838.	} Served 2 Mar. 1838, on defendant's attorney, by E. F. of —.
<i>Record of a judgment of the court of King's Bench, in an action, J. S. v. J. N. ....</i>	} Trin. term, 10 G. 4.	
<i>Letters patent of King Charles II. in the Rolls' Chapel ....</i>	} 1 Jan. 1680.	

## SECTION XIII.

## Witnesses.

## 1. Compelling the attendance of witnesses.

*Subpœna.*] The writ of subpœna is directed to the witness or witnesses, and requires them to appear before the chief justice, &c. or judges of assize, on a certain day, to testify the truth according to their knowledge, in a certain cause, on the part of the plaintiff or defendant, under the penalty of 100*l*. See the form in the Appendix. Blank forms may be had at the stationer's; get one on parchment, and as many copies on paper as there are witnesses to be subpœnaed; fill them up; and get the writ signed and sealed; and then serve each witness with a copy, taking care to make a memorandum of the time and manner of service.

The witness must be served personally with the copy, and the original writ must at the same time be shown to him, otherwise no attachment will be awarded against him for not obeying it. *Wadsworth v. Marshall*, 1 *Crompt. & M.* 87. *Jacob v. Hungate*, 3 *Dowl.* 456. It must also be served before the time mentioned in it for the witness's attendance, otherwise no attachment will lie. *Alexander v. Dixon*, 1 *Bing.* 366,

And it may be advisable to inform him of the time when it is likely his attendance will actually be required. See *Blandford v. De Tastet*, 5 Taunt. 260. Keeping a witness out of the way, to avoid service of a subpoena, or otherwise preventing the service, may subject the party doing so to an attachment. See *Clement v. Williams*, 1 Hodg. 382.

At the time of serving the subpoena, in town causes, if the witness live within the bills of mortality, a shilling is usually given or tendered to him. See *Betteley v. M'Leod*, 3 Bing. N. C. 405. In country causes, however, and in town causes where the witness lives beyond the bills of mortality, a sum sufficient to pay the necessary expenses of the witness in going to, remaining at, and returning from, the place of trial, calculated according to his circumstances, &c. see *Dixon v. Lee*, 1 Cr. M. & R. 645, must be paid or tendered to him at the time of service, *Fuller v. Prentice*, 1 H. Bl. 49, or at least a reasonable time before the trial, *Horne v. Smith*, 6 Taunt. 9. *Newton v. Harland et al.*, 1 Man. & Gr. 956, otherwise he is not bound to go; *Ashton v. Haigh*, 2 Chit. 201; or if he attend, he will not be subject to an attachment for refusing to give evidence. *Bowles v. Johnson*, 1 W. Bl. 36.

If the cause be made a remanet, the subpoena must be altered and re-sealed; and copies must again be served upon the witnesses, in the manner above mentioned. *Anon.* 23 June, 1792. MS. B. 1422. *Sydenham v. Bond*, 2 Tidd. 855.

As to the privilege of a witness from arrest, see *ante*, p. 164.

*Subpoena duces tecum.*] If the witness have any document, which you wish him to produce, you should serve him with a subpoena duces tecum, which after requiring him to appear, as in the common subpoena, adds, "and also that you bring with you and produce at the time and place aforesaid a certain," &c. describing the instrument. See the form in the Appendix, and see *Evans v. Moseley*, 2 Dowd. 364. *Colley v. Smith*, 6 Id. 399.

This is sued out and served, in the same manner as the common subpoena; if served upon a public officer, and his personal attendance be required, he must be informed of it at the time of service: otherwise the court will not grant an attachment against him for not personally attending. *Bennett v. Jones*, 2 Chit. 403. If the witness attend at the trial, he may be called upon to produce the instrument without being sworn. *Perry v. Gibson*, 3 Nev. & M. 462. *Summers v. Moseley*, 2 Cr. & M. 477. And if he fail to do so, or fail to attend, without sufficient excuse, the court may award an attachment against him. See *Doe v. Kelly*, 4 Dowd. 273 and *infra*. If it be a deed, however, and he claim title under it, he is not bound to produce it. *Doe v. Owen*, 8 Car. & P. 110. So if the witness be an attorney, and claim a lien upon

the deed, he may refuse to produce it; but the party may in that case give secondary evidence of its contents. *Doe v. Ross*, 7 Mees. & W. 102.

*Habeas corpus ad testificandum.*] If the witness be in custody for debt, you must sue out a writ of *habeas corpus ad testificandum*, directed to the officer in whose custody he is. Before you can do this, you must first make an affidavit that the cause is entered for trial, that the prisoner is a material and necessary witness for plaintiff or defendant, without whose testimony he cannot safely proceed to trial, and that the prisoner is ready and willing to attend as a witness. See the form in the Appendix; and see *Fennell v. Tait*, 1 Cr. M. & R. 584. Take this to a judge's chambers, and you will thereupon obtain a fiat for the writ. See *stat. 44 G. 3, c. 102*. As to the attendance of prisoners in custody at the suit of the crown, see *Leigh v. Sherry*, 2 Moore, 33. *Re Price*, 4 East, 587. *R. v. Pilgrim*, 4 Dougl. 89.

Having obtained the fiat, get a copy of the writ on parchment and another on paper; fill them up, and get the writ signed and sealed, for which the fiat will be the officer's warrant; then lodge the writ with the officer to whom it is directed, paying or tendering to him his reasonable charges for bringing up the prisoner; keep the copy.

*Remedy for non-attendance.*] The usual remedy against a witness for non-attendance at the trial, is by attachment. To entitle the party to this remedy, the witness must have been personally served with a copy of the subpoena, and the original at the same time shown to him; *Wordsworth v. Marshall*, 1 Cr. & M. 87. *Garden v. Crosswell*, 2 Mees. & W. 319; and his necessary expenses must be paid or tendered to him, as already mentioned, *ante*, p. 394. *Dixon v. Lee*, 1 Cr. M. & R. 645, and the affidavit must state that he was a material witness. *Tinley v. Porter*, 2 Mees. & W. 822; and see *Dicas v. Lawson*, 1 Cr. M. & R. 934. *R. v. Russel*, 7 Dougl. 693. *Chapman v. Davis*, 11 Law J., 51, *cp.* Whether the cause have actually been called on or not, or the jury sworn, seems to be immaterial; *Barrow v. Humphreys*, 3 B. & A. 598; but the witness must be called upon his subpoena. *Malcolm v. Ray*, 3 Moore, 222. *R. v. Stretch*, 3 Dougl. 368. See *R. v. Fenn*, *Id.* 546. *Lamonte et al. v. Crook*, 9 Law J., 253, *ex. Re Jacobs*, 1 Har. & W. 123. Where in the Common Pleas the writ required the witness's attendance in the court at Westminster, and the sittings were in fact holden at the sessions house, Westminster, but there were notices affixed to the walls of the court directing witnesses to go to the sessions house: the court held the mistake to be immaterial, and granted the attachment. *Chapman v. Davis*, 1 Dougl. N. C. 239. So, where it required his attendance on the 31st March,

and he was not served until the 2nd April, but the cause was not in fact tried until the 6th, the court held it to be immaterial. *Davis v. Lovell*, 7 Dowl. 178, 8 Law J., 152, *ex.* But where the writ required the witness to attend on the 6th June, without adding "and from day to day" after that day, and on the 6th the trial was put off until the 18th, and on the 18th the witness did not attend, the court refused to grant an attachment. *Vaughton v. Brins et al.*, 9 Dowl. 179. The application for the attachment must be made promptly; where the trial was on the 11th December, and the application not until the 23rd April, the court refused it. *R. v. Stretch*, 4 Dowl. 30, 1 Har. & W. 323.

Or, by 5 El. c. 9, s. 12, the party may maintain an action against a witness who fails to attend at the trial, after being served with a subpoena, &c. See *Betteley v. McLeod*, 3 Bing. N.C. 405. *Lamonte et al. v. Crook*, 6 Mees. & W. 615, 9 Law J., 253, *ex.* *Davis v. Lovell*, 4 Mees. & W. 678, 8 Law J., 152, *ex.* *Mullett et al. v. Hunt*, 1 Cr. & M. 752.

## 2. Examination of witnesses on interrogatories.

*In India.*] By stat. 13 G. 3, c. 63, s. 44, if a suit be commenced in any of the courts at Westminster, for a cause of action which arose in India, the court may award a writ in the nature of a mandamus or commission for the examination of witnesses in that country; and upon the examination being returned, it shall be allowed and read as evidence at the trial. And the opposite party may have a copy of the depositions upon paying for it. *Davis v. Nicholson*, 7 Bing. 358. See 8 East, 31. 1 B. & P. 177. *Grillard v. Hague*, 1 B. & B. 519. See the form of the affidavit for the rule, in the Appendix; of the rule, *Id.*; and of the writ in the nature of a mandamus or commission, *Id.* The Exchequer may grant a mandamus, as well as the other courts, under this statute. *Savage v. Binny*, 2 Dowl. 643. The rule is a rule nisi only. *Doe v. Pattison*, 3 Dowl. 35. In no other case, however, could this formerly be done, unless with the consent of parties, until the law in this respect was lately altered by stat. 1 W. 4, c. 22, *infra*.

*In the colonies.*] By stat. 1 W. 4, c. 22, s. 1, after reciting the above section of the stat. 13 G. 3, c. 63, it is enacted, "that all and every the powers, authorities, provisions and matters contained in the said recited act, relating to the examination of witnesses in India, shall be, and the same are hereby extended to all colonies, islands, plantations, and places under the dominion of his Majesty in foreign parts, and to the judges of the several courts therein, and to all actions depending in any of his majesty's courts of law at Westminster, in what place or country soever the cause of action may have arisen, and whether

the same may have arisen within the jurisdiction of the court to the judges whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of witnesses under a writ or commission issued in pursuance of the authority hereby given, will be necessary or conducive to the due administration of justice in the matter wherein such writ shall be applied for." The costs to be in the discretion of the court issuing the writ or commission. *Id.* s. 3. Under this act, a mandamus may be granted to examine witnesses in India, although the cause of action may have arisen in this country. *Bain v. De Vetry*, 3 Dowl. 518. Where the application is made upon the part of a defendant, it is not necessary that he should make an affidavit of merits, or swear that his plea is true. *Westmoreland v. Huggins*, 1 Dowl. N. C. 800.

*In England, Wales, or elsewhere.*] By the same statute, 1 W. 4, c. 22, s. 4, "it shall be lawful to and for each of the said courts at Westminster, and also the court of Common Pleas of the county palatine of Lancaster, and the court of Pleas of the county palatine of Durham, and the several judges thereof, in any action depending in such court, upon the application of any of the parties to such suit, to order the examination on oath, upon interrogatories or otherwise, before the master or prothonotary of the said court, or other person or persons to be named in such order, of any witnesses within the jurisdiction of the court where the action shall be depending, or to order a commission to issue for the examination of witnesses on oath, at any place or places out of such jurisdiction, by interrogatories or otherwise, and by the same or any subsequent order or orders to give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction of the court wherein the action shall be depending as without, and all other matters and circumstances connected with such examinations as may appear reasonable and just. This section of the act has been holden to extend to a case, where the witness was in France; *Ducket v. Williams*, 1 C. & J. 510; and to a case where a witness was so unwell that there was no probability of his being able to attend at the trial. *Pond v. Dimes*, 2 Dowl. 730. If the witness be within the jurisdiction of the court, the court make a rule or order merely; but if out of the jurisdiction, the court must order a commission to issue. If there be a rule or order only, the witnesses may thereby, or by another order, be required to attend to be examined, or to produce certain writings, &c., and a disobedience will be deemed a contempt of the court. See s. 5. So the court or judge may award a *habeas corpus ad testificandum*, to bring up a witness to be examined, s. 6. And the person ordered to take the examination may make a special report to the court, touching such examination, and the conduct or

absence of witnesses or other persons; and the court may thereupon institute such proceedings against them as in case of an attachment. *See s. 8.* The costs to be costs in the cause, unless otherwise ordered, either by the judge making the order, the judge who may try the cause, or by the court. *s. 9.*

*Manner of proceeding.] The first proceeding, of course, is the application to the court, or to a judge thereof in vacation, upon an affidavit, stating the names of the witnesses sought to be examined, Gunter v. McTear, 1 Mees. & W. 201, and see Norton v. Ld. Melbourne, 3 Bing. N. C. 67, and that they are material and necessary, without whose evidence the party cannot proceed to trial with safety; see Baddeley v. Gilmore, 1 M. & W. 55; stating also where the witnesses reside, and, if in England, the grounds upon which you apply to have them examined upon interrogatories. See Abrahams v. Norton, 1 Dowl. 266. Carruthers v. Graham et al., 10 Law J., 364, qb. And in all cases stating that issue has been joined; for before that, it is impossible to judge whether the witness will be material or necessary. Mondel v. Steele, 8 Mees. & W. 300. It is not necessary, where the application is made by the defendant, to swear to merits, or that the application is not made for delay. Baddeley v. Gilmore, 1 Gale, 410. Westmoreland v. Huggins, 1 Dowl. N. C. 800. See Lloyd v. Key, 3 Dowl. 253. If indeed it appear to be made for delay, the court will order the money to be brought into court. Dalton v. Lloyd, 1 Gal. 102. If the examination is to be in England, and the reason for the application be the illness of the witness, an affidavit of a physician or surgeon to that effect will also be required. Davis v. Lowndes, 7 Dowl. 101, 8 Law J., 10, cp. If the examination is to be in any of the colonies, the affidavit also should state the names of the judges and the style of the court to which the writ is to be directed; or at least this should be indorsed on the brief, to enable the officer to draw up the rule. And the same, as to the name of the person who is to examine on interrogatories in this country. Doe v. Phillips, 1 Dowl. 56. Besides the witnesses mentioned, the court in their rule, or the judge in his order, may direct generally an examination of any other witness who may be found at the place, knowing any thing of the matter. Dimond v. Vallance, 7 Dowl. 590. Beresford v. Easthope, 8 Dowl. 294. If you obtain the rule nisi or summons, proceed to make the rule absolute, or to obtain an order, in the usual way. See Weekes v. Pall, 6 Dowl. 462. The court, in a very urgent case, where the witnesses were about to sail on a voyage in two days, granted in the first instance a rule absolute unless cause shown on the morrow. Pirie v. Iron, 1 Dowl. 252. Then, if the examination is to be in India or the colonies, sue out a writ in the nature of a mandamus, directed to the judges of a court there; (see the form in the Appendix;) get it signed and sealed; or if*

*the examination is to be abroad elsewhere, or otherwise out of the jurisdiction of the court, sue out a commission (see the form in the Appendix); but where the examination is to be in this country, the rule or order is itself in the nature of a commission. Care must be taken to sue out the writ or commission with as little delay as possible. Where the rule was obtained in December, and the trial thereby put off until the sittings after Hilary term, but the commission was not sued out until June, and was made returnable in the Michaelmas term following: the court held that the depositions taken under it were not receivable in evidence. Steinkeller v. Newton, 9 Law J., 262, cp. Where the commission is directed to a foreign court, it should contain words of authority only, not of command, and should omit the usual clause as to commissioners being sworn. Ponsford v. Connor, 9 Law J., 99, ex., 5 Mees. & W. 673. Let the interrogatories and cross-interrogatories be drawn and signed by counsel, and then engrossed on parchment; (see the forms in the Appendix;) and let copies be served on the opposite attorneys respectively. Then annex them to the rule, mandamus, or commission, and have them delivered to the person or persons who are to take the examinations. The witnesses are then examined on oath or affirmation, (which oath, &c. may be administered by the person authorized to take the examination, 1 W. 4, c. 22, s. 7); and the depositions afterwards certified to the court, from which the commission, &c. issued, under the seal of the commissioners. Instead of cross-examining the witnesses by cross-interrogatories, as here mentioned, the court, upon application, may order them to be cross-examined *viva voce*, if they think fit. Pole v. Rogers, 3 Bing. N. C. 780. If after suing out the commission or writ, it become necessary, the court, upon application, will quash it. Hodges v. Daly, 8 Dowl. 308.*

5. *In what cases the depositions may afterwards be used.]* By stat. 1 W. 4, c. 22, s. 10, "no examination or deposition to be taken by virtue of this act, shall be read in evidence at any trial, without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the judge, that the examinant or deponent is beyond the jurisdiction of the court, or dead, or unable from permanent sickness or other permanent infirmity to attend the trial; in all or any of which cases, the examinations and depositions, certified under the hand of the commissioners, master, prothonotary or other person taking the same, shall and may, without proof of the signature to such certificate, be received and read in evidence, saving all just exceptions." Where instead of returning the depositions themselves, the court abroad merely sent certified copies under their seal, it was holden that they could not be read in evidence. *Clay v. Stephenson et al.*, 7 Ad. & El. 185. The depositions may be read at the



trial, for either party, upon proof that the witness is abroad, &c.; *Procter v. Lainson et al.*, 7 Car. & P. 629; and the judge may exclude from the notice of the jury any part he may think inadmissible, even a part of an answer to a question, and retain the remainder. *Tufton v. Whitmore*, 9 Law J., 405, *qb.*

## SECTION XIV.

*Demurrer to evidence.*

Where evidence is given, which is not sufficient to support the issue, the party against whom it is given may demur to it. By demurring to it, he admits the facts proved by it, but takes the opinion of the court above as to its sufficiency. See the form of the demurrer, and joinder, in the Appendix. When the demurrer is put in, it is tacked to the record; and the jury may either assess contingent damages, or may be discharged, and the damages afterwards be assessed upon a writ of inquiry. See *Bull. N. P.* 313—315. *Fanshawe v. Cocksedge*, 3 Bro. P. C. 690, 1 Doug. 119. *Cort v. Birkbeck*, 1 Doug. 218. *Gibson v. Hunter*, 2 H. Bl. 187. As a demurrer to evidence very seldom occurs in practice, the parties usually deriving the same benefit from a motion for a new trial, it is unnecessary to notice it in detail.

## SECTION XV.

*Bill of exceptions.*

A bill of exception lies, where either party at *nisi prius* is overruled by the judge upon any point of law, arising from facts not denied, or in admitting or refusing to admit evidence, or a challenge, or the like. *Bull. N. P.* 316. And see *Strother v. Hutchinson*, 4 Bing. N. C. 83. It is given by the statute of Westminster 2, (13 Ed. 1, c. 31), as a mode of rectifying the errors of judges before whom issues in fact are tried. Although, perhaps, in strictness, the bill should be drawn out in form, and tendered at *nisi prius* to the judge for his signature, no such thing in fact takes place in practice. Nothing more is done at *nisi prius*, than merely the counsel excepting stating that he does so, and stating the point upon which he excepts, of which a memorandum is taken by the parties and the judge; afterwards the bill is drawn up in form, upon parchment, (see the form, *Bull. N. P.* 317, 320; and see *Armstrong v. Lewis*, 2 Cr. & M. 274. *Culley v. Doe*, 9 Law J., 288, *qb.*) sealed by the judge, and a writ of error sued out thereon. The same proceedings then take place, as in error upon ordi-

nary occasions; the court of error decide upon the point objected, for or against the party objecting; if for him, a *venire de novo* is awarded, *Davies v. Pierce*, 2 T. R. 125, but he is not entitled to costs; *Summers v. Formby*, 1 B. & C. 100; if against him, the party of course has his judgment and costs. And the costs of settling the bill of exceptions, &c., are costs in error. *Dee v. Francis*, 7 Dougl. 193.

Care must be taken not to bring the writ of error, until the bill of exceptions have been sealed by the judge. See *Dillon v. Parker*, 1 Bing. 17. *Taylor v. Williams*, 2 B. & Ad. 846. *Williams v. Taylor*, 6 Bing. 512. Where upon a trial before the undersheriff, a bill of exceptions was tendered to him, but he refused to receive it: the court refused to interfere to stay the execution, but left the party to his action. *White v. Bishop*, 4 Mees. & W. 73.

## SECTION XVI.

## Nonsuit.

*In what cases.]* If the plaintiff fail to make out his case, the judge may nonsuit him, if he will submit to it. So, if it appear in the course of the trial, that the action cannot legally be maintained, the judge may nonsuit the plaintiff, even although the objection appear upon the record. *Williamson v. Watts*, 1 Camp. 552. *Sadler v. Robins*, 1 Camp. 256. But where it appeared from the declaration, in an action of debt on bond against two, that the bond was executed by three, it was holden that, although this was good matter of plea in abatement, or of motion in arrest of judgment, it was no ground of nonsuit on the plea of *non est factum*. *Tanner v. Jones*, 2 Taunt. 254.

A plaintiff, however, cannot regularly be nonsuit, if he refuse to submit to it, and require the case to go to the jury; *Watkins v. Towers*, 2 T. R. 271. *Ward v. Mason*, 9 Price, 291. *Strother v. Hutchinson*, 4 Bing. N. C. 83; and this, even where the venue has been brought back on the usual undertaking to give material evidence in the county, and the plaintiff fails at the trial to do so. *Jackson v. Williamson*, 2 T. R. 281. On the other hand, if the plaintiff be not present at the trial, by himself or counsel, no verdict can be given against him, he can only be nonsuit, *Anderson v. Shaw*, 3 Bing. 290, even although the trial be had upon the defendant's record; *Symes v. Larby*, 2 Car. & P. 358. *Gardener v. Davis*, 1 Wils. 300; but in such a case, where a verdict was taken instead of a nonsuit, the court refused to set it aside, unless the plaintiff would consent to a nonsuit being entered. *Hodgson v. Forster*, 1 B. & C. 110. Where however the jury, not being able to

agree upon their verdict, were locked up all night, and in the morning, upon their appearing in court, and still not agreeing, the judge nonsuited the plaintiff: the court held that instead of a nonsuit, the judge should have discharged the jury, and they therefore set aside the nonsuit. *Dewar v. Purday*, 4 Nev. & M. 633, 1 Har. & W. 227.

Formerly it was holden that if one of two defendants suffered judgment by the default, and the other proceeded to trial, the plaintiff could not be nonsuit as to the latter, but that there must be a verdict against him; *Hannay v. Smith*, 3 T. R. 662; but this has since been ruled otherwise, *Murphy v. Donlan*, 5 B. & C. 178, and the usual practice is now according to this latter decision.

No motion can be made in banc, that a nonsuit shall be entered, instead of a verdict for the plaintiff, unless the judge at the trial have given permission for that purpose. *Rickets v. Burman*, 4 Dowl. 578. *Minchin v. Clement*, 1 B. & A. 252. *Gardener v. Davis*, 1 Wils. 301.

Upon a nonsuit, the defendant is entitled to his costs. See post, vol. ii, tit. "Costs."

As to setting aside a nonsuit, see vol. ii, tit. "New Trial;" and as to the form of the judgment, see the Appendix.

#### SECTION XVII.

##### Verdict.

1. *General verdict.*
2. *Special verdict.*
3. *Damages.*
4. *Verdict subject to a special case.*

##### 1. General verdict.

A general verdict is, where the jury find for one or other of the parties, or partly for one, partly for the other, without stating the facts from which they have drawn their conclusion. They may find wholly for the plaintiff, on all the issues, or wholly for the defendant: if for the plaintiff, although the verdict be general on all the counts of the declaration, yet if the declaration contain two or more counts for the same cause of action, it is optional with the plaintiff to enter it on which of these counts he pleases; the judge, at the trial indeed, will not compel him then to elect on which count or counts he will enter it, *Ferguson v. Clark*, 2 Stark. 442, but the court will, in the following term. *Lee v. Muggeridge*, 5 Taunt. 42. And if he make a mistake in this respect, by entering the verdict on a count that is bad in law,

the court will in general give him leave to amend the postea by entering the verdict on some other good count, *see* vol. ii, *tit. "Amendment,"* if the application be made in time; *see Harrison v. King*, 1 B. & A. 161; but the court have refused to entertain an application by the defendant, to confine the verdict to particular counts, where a general verdict for the plaintiff had been taken at the trial, by consent, on all the counts. *Martin v. Coleman*, 1 Har. & W. 86.

Or the jury may find for the plaintiff on some of the issues, and for the defendant on others. *See Amor v. Cuthbert*, 1 Dowl. N. C. 160. If the defendant have pleaded specially, as well as the general issue, the plaintiff should take care to have all the issues, not proved by the defendant to be found for him, even although the defendant may have succeeded upon a plea, which is an answer to the whole action; for even in that case, a verdict for the plaintiff on some of the issues, may make a material difference to him with respect to costs. *See* vol. ii, "*Costs.*" And if there be any defect in the plea on which the defendant has succeeded, so as to render it at all probable that the court may give the plaintiff judgment *non obstante veredicto* with respect to it, the plaintiff should have damages assessed for him upon the other issues; for he will probably not be able afterwards to remedy the omission by a writ of inquiry. *See ante*, p. 309. On the other hand, the defendant should take care, where there are several counts in the declaration, that a verdict be given for him on all those counts which are not proved, in order that he may be allowed his costs upon those issues. *See* vol. ii, *tit. "Costs."*

And not only may the jury find on some of the issues for one party, some for another, but where a plea can be construed distributively, such as a right of way for carriages *and* on foot, *R. G. H. 4 W. 4*, or a right of way to bring water *and* goods, *Knight v. Woore*, 3 Bing. N. C. 3, or the like, the jury may find for the defendants as to part of the plea, and for the plaintiff as to the residue. So, in ejectment for several tenements, the jury may find for the plaintiff as to some, and for the defendants as to others. *See Doe v. Errington*, 4 Dowl. 602. And the same in covenant, where there are several breaches assigned.

So, in trespass, case, trover, or ejectment, against two or more defendants, the jury may find a verdict against some, and acquit the others. *Cooper v. South*, 4 Taunt. 802. *Bretherton v. Wood*, 3 Brod. & B. 54. This, however, cannot be done in actions on contracts, but if the jury think that the case is not proved against any of the defendants, they should give a verdict generally for all.

Care must be taken not to take the verdict for more damages than are laid in the declaration. *See Tomlinson v. Blacksmith*, 7 T. R. 132. But a mistake in this respect may be remedied

by entering a *remittitur damna* for the excess. *Usher v. Dasey*, 4 M. & S. 94. *Pickwood v. Wright*, 1 H. Bl. 642.

## 2. *Special verdict.*

A jury may, if they will, find the facts specially, leaving the conclusion of law to be decided by the court. And where, in trespass to a fishery, justifications were pleaded, and the jury found the defendant justified on one issue, and stated the right under which they found him to be so justified: the court held that such finding might be treated as a special verdict. *Bennett v. Coster*, 8 Tunt. 183. It is not very usual, however, for juries to insist upon giving a special verdict; it is usually done by direction of the judge, upon the suggestion or at the request of the parties or either of them. *See Ricketts v. Salvey*, 1 Chit. 108, 115.

The special verdict is drawn by counsel, settled by the counsel on the other side; signed by the junior counsel on both sides, in the same manner as a special case, (*see post*, p. 407.) and then set down for argument. It is not necessary that there should be a concilium; but you merely set it down with the master, paying a fee of 1s., and then you must forthwith give notice of your having done so, to the opposite party. *R. G. H. 4 W. 4, s. 6.*

## 3. *Damages.*

*In what cases.*] Damages are given in all personal actions, except in debt on statute by a common informer. *Cuming v. Sibloy*, 4 Burr. 2489. In debt they are nominal, the debt itself being the principal subject of the action; except in debt on bond conditioned for the performance of some act mentioned in the same or some other deed, where breaches are assigned under stat. 8 & 9 W. 3, c. 11, s. 8, in which case the jury give damages for the non-performance of the act; *see ante*, p. 327; in all other cases, damages are the principal object of the action. In replevin, not only is the plaintiff entitled to damages (and which in ordinary cases, where there is no special damage, are in practice always assessed at £2 2s. in London, Middlesex, York and some other places, £2 10s. elsewhere), but the defendant, if he recover, in cases where the distress was for rent, customs, services, or damage feasant, may have damages assessed for him by the verdict or inquisition. 7 H. 8, c. 4. 21 H. 8, c. 19, s. 3. *See 1 Sound. 195 a.*

*Where there are several defendants.*] Where there are several defendants, the damages must be joint as against all; the jury cannot sever them, even in trespass, *Mitchell v. Millbank*, 6 T.

R. 199. *Hill v. Goodchild*, 5 Burr. 2790. and see *Hancock v. Haywood*, 3 T. R. 433, however different the conduct of the defendants may have been in the transaction which is the subject of the action. And therefore it is, that in trespass against several, who allow judgment to go by default, you can have but one writ of inquiry against all. *Id.* And where one pleads, and another allows judgment to go by default, the same sum the jury find as damages against the one, they assess as damages against the other.

*Where there are several counts.*] Where there are several counts, the jury may give entire damages; or they may sever them, and give damages on each count, or on each class of counts. See *Holford v. Dunnatt*, 7 Mees. & W. 348. If they give entire damages, and one count turns out to be bad, the defendant may move in arrest of judgment, or bring a writ of error, see *Holt v. Scholefield*, 6 T. R. 691, unless the error can be remedied by amendment. See post, tit. "Amendment," and see *Dodd v. Crease*, 2 Cr. & M. 223. *Empson v. Griffin*, 9 Law J., 23, *qb.*

*Increasing or reducing damages.*] In some old cases, it appears that in actions for mayhem or wounding, the court, upon inspection of the plaintiff, have increased the damages given by the jury. But there is no modern instance of the court doing so; nor will they amend the postea, by increasing the damages, in any other case. See post, tit. "Amendment." *Cann v. Facey*, 5 Nev. & M. 405. *Baker v. Brown*, 2 Mees. & W. 199. Nor can they reduce the damages, without the consent of the plaintiff, however excessive they may be; all they can do, is to grant a new trial. It often happens at the trial, however, where a point of law is raised, which may affect the damages by increasing or reducing them, and the judge, although he decides the point, wishes to give the party, against whom he decides, an opportunity of taking the opinion of the court upon the subject: in such cases, after taking the opinion of the jury, if necessary, as to the damages in either alternative, he orders the verdict to be entered according as he has decided the point of law, with liberty to the other party to move to increase or reduce the damages, if the court should be of a different opinion; and the verdict is ultimately entered, as the court may decide.

*Double and treble damages.*] In some cases, by statute, double, and even treble, damages are given. In such cases, the damages given by the jury are actually doubled or trebled; *Buckle v. Beves*, 4 B. & C. 154; and are not calculated as was formerly done in the cases of double or treble costs.

*Interest, as damages.*] By stat. 3 & 4 W. 4, c. 42, s. 28,

"upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquiry of damages, may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases, in which it is now payable by law. Where an attorney made this demand with respect to his bill for business done, which was afterwards, and after action brought, referred for taxation at the instance of the defendant, no terms being made as to the allowance of interest, the court held that he had thereby lost the benefit of his demand under the statute. *Berrington et al. v. Phillips*, 1 *Mees. & W.* 48.

And by sect. 29, "the jury, on the trial of any issue or inquiry of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover, or trespass *de bonis asportatis*, and over and above the money recoverable in all actions on policies of insurance made after the passing of this Act."

Independently of this statute, however, interest is recoverable as damages, in actions upon bills of exchange and promissory notes, see *Auriol v. Thomas*, 2 *T. R.* 52. *Raffey v. Greenwell et al.*, 8 *Law J.*, 336, *qb.*, calculated from the day on which they became due, until the day on which the plaintiff may sign judgment; or in an action on a promissory note payable on demand, from the commencement of the action, that is, from the date of the writ. *Pierce v. Fothergill*, 2 *Bing. N. C.* 167. So where goods are sold, payable by bill at a certain date, the vendor may recover interest, as damages, calculated from the time the bill, if given, would have become due. *Marshall v. Poole*, 13 *East*, 98. *Slack v. Lovell*, 3 *Taunt.* 157. *Boyce v. Warburton*, 2 *Camp.* 480. *Farr v. Ward*, 3 *Mees. & W.* 28. *Davis v. Smyth*, 8 *Id.* 399. But interest is not recoverable as damages, for money lent, independently of the above statute, unless there have been an express contract, or unless the plaintiff be entitled to it by the custom of some particular trade. *Calton v. Bragg*, 15 *East*, 223. *Shaw v. Picton*, 4 *B. & C.* 715. *Walker v. Constable*, 1 *B. & P.* 306.

#### 4. Special case.

*From a court of equity.*] When a court of equity directs a case to be sent to a court of law, for their opinion, the case is

settled by counsel engaged in the cause in equity; or if they cannot agree in a statement of the facts, it is usually referred to one of the masters, to settle. It must however be signed by counsel, in all cases; where it was signed only by the master who settled it, the officer of the court of Common Pleas refused to set it down for argument, and the court held that he was right in doing so. *Roy v. Champneys*, 3 Dowl. 105. *Nanfan v. Legh*, 7 Taunt. 85.

*From a court of law.*] It frequently happens at *nisi prius*, where the matter in issue turns upon a mere point of law, that, at the suggestion of the judge, and with consent of the parties, a verdict is given for the plaintiff, subject to a case for the opinion of the court in which the record was made up, upon the point of law; and according to the decision of the court upon the case, the verdict and judgment are ultimately entered. It is also sometimes made part of the terms upon which a case is consented to, that either party shall be at liberty to turn it into a special verdict, in order that the opinion of a court of error may be taken upon the point of law, if desired. But a special case cannot thus be turned into a special verdict, unless a power to that effect be expressly reserved, *Archb. of Canterbury v. Robertson*, 2 Dowl. 78, or except by consent of parties, and then, it seems, only by leave of the court. See 1 Nev. & M. 181, n.

Also where a new trial is moved for, on a point of law, either reserved at the trial, or on which it is alleged that the judge misdirected the jury, if the point be one of any nicety or difficulty, the court frequently suggest the propriety of having the matter turned into a special case, as the most convenient mode of obtaining a deliberate opinion of the court upon it.

Also, by stat. 3 & 4 W. 4, c. 42, s. 25, it shall be lawful for the parties in any action or information, after issue joined, by consent, and by order of any of the judges of the superior courts, to state the facts of the case, in the form of a special case, for the opinion of the court, and to agree that a judgment shall be entered for the plaintiff or defendant, by confession, or of *nolle prosequi*, immediately after the decision of the case, or otherwise as the court may think fit.

The case is stated by the junior counsel in the cause on both sides; it should state the facts proved or agreed upon at the trial, and not merely the evidence of those facts. *Palmer v. Johnson*, 2 Wils. 163. If the counsel cannot agree upon the facts, statements are made out on both sides, and laid before the judge who tried the cause, who will adopt either statement, with such alterations as he may think fit to make in it, or will state a case himself from his notes of the trial. See *Jackson v. Hall*, 8 Taunt. 421. The case, if stated by counsel, must be signed by them; *Id.*; or if stated by any other person agreed upon between the parties, must be signed by him, but



need not in that case be signed by the counsel of the parties. See *Prius v. Quarrell*, 11 *Law J.*, 84, *qb.* If after a case is granted or ordered, the defendant refuse to proceed with or settle it, &c., the court upon application usually order the *postea* to be delivered to the plaintiff; *Id. R. v. Smith*, 3 *Chit.* 398; if the plaintiff refuse, the defendant may apply to set aside the verdict, unless there appear to be sufficient grounds for the plaintiff's refusal. *Cottam et al. v. Partridge*, 10 *Law J.*, 186, *cp. Medley v. Smith*, 6 *Moore*, 53. It is not necessary now to move for a concilium; but you may set down the case for argument with the master, paying a fee of 1s., and you must then forthwith give notice to the opposite party of your having done so. *R. G. H. 4, W. 4, s. 6.*

## SECTION XVIII.

## Death or marriage of parties.

1. Death of parties.
2. Marriage of a feme party.

## 1. Death of parties.

*Its effect upon the action.*] At common law, if any of the parties died before final judgment, the suit abated. 2 *Saund.* 72 *i.* But by 8 & 9 *W. 3, c. 11, s. 6*, if a sole plaintiff or defendant die between interlocutory and final judgment, the action shall not abate, if it be such as could have been maintained by or against his executors. See *Berger v. Green*, 1 *M. & S.* 229. *Ireland v. Champneys*, 4 *Taunt.* 384. *Wallop v. Jewin*, 1 *Wils.* 315.

And by 17 *Car. 2, c. 8, s. 1*, the death of either party between verdict and judgment, shall not be alleged for error, so as judgment be entered within two terms after the verdict. Where it is not entered up within the two terms, the court will not allow it to be entered up afterwards, *nunc pro tunc*, *Doe v. Crisp*, 7 *Dowl.* 534, and see *Wilkins v. Cauty*, 11 *Law J.*, 191, *qb.*, *Copley v. Day*, 4 *Taunt.* 702, unless the delay be the act of the court. *Evans v. Rees*, 12 *Ad. & El.* 167. As the whole of the sittings or assizes, at which the cause is to be tried, are considered as one day, if either party die on or after the first day of the sittings or the commission day of the assizes, although before the trial actually takes place, it is within the remedy of the statute, and judgment may follow; for the whole of the sittings or assizes have relation to the first day; *Jacobs v. Miniconi*, 7 *T. R.* 31; but if he die before the first day, the action is thereby abated. *Taylor v. Harris*, 3 *B. & P.* 549; and see *Johnson v. Hamilton*, 1 *Mees. & W.* 149. *Johnson v. Budge*, 1 *Cr. M. & R.* 647. Under this statute, an executor may enter up judgment in as

action for libel, upon a verdict obtained by his testator. *Palmer v. Cohen*, 2 B. & Ad. 966. The statute however does not extend to nonsuits. *Dowbiggin v. Harrison*, 10 B. & C. 480. The judgment in this case is entered as if the party were alive, and then a *scire facias* is sued out in order to make the executor or administrator of the deceased a party to the suit. *Earl v. Brown*, 1 Wils. 302. Formerly, when the judgment had reference to the first day of the term, if a defendant died after that time, the plaintiff might still sue out a *fi. fa.* tested on the first day of the term, and levy upon the goods of the deceased in the hands of the executor, without suing out a *scire facias*; *Bragner v. Langmead*, 7 T. R. 20; or if the testator had given a cognovit or warrant of attorney, and died after the first day of term, judgment might be entered up, having relation to the first day of term, and a *fi. fa.* tested on that day might be executed upon the goods of the deceased. *Oder v. Woodward*, 2 Ld. Raym. 766. *Heapy v. Paris*, 6 T. R. 369. 1 Saund. 219 e. But as judgments no longer have relation back to the first day of the term, but take effect only from the day on which they are actually signed (R. G. H. 4 W. 4, r. 2, s. 3,) this cannot now be done. See *Chick v. Smith*, 8 Dowl. 337. *Blackburn v. Godrick*, 9 Dowl. 337. Where there were cross actions, the court on application ordered the judgment in one to be set off against the judgment in the other, although the plaintiff in one of them was dead, and the judgment assets in the hands of his executor. *Bridges v. Smith*, 8 Bing. 29. If the plaintiff die after obtaining a verdict, the court may notwithstanding grant a new trial; but they will take care to impose such terms on the defendant, as to prevent him taking any advantage of the death. *Griffith v. Williams*, 1 Crompt. & J. 47.

If one of two or more plaintiffs or defendants die pending the suit, if the action survive to or against the survivor, it shall not abate; but the death being suggested upon the record, the action shall proceed at the suit of or against the survivor. 8 & 9 W. 3, c. 11, s. 7. If the death happen before issue joined, the suggestion is entered in making up the issue; if after it, then it will be sufficient to suggest the death at the time the plea roll is made up. *Far v. Denn*, 1 Burr. 362, and see *Newnham v. Law*, 5 T. R. 577. But where husband and wife commenced an action for money lent by the wife before marriage, and she died pending the action; and the defendant afterwards applied for judgment as in case of a nonsuit: the court refused the rule, holding that the action had abated by the death of the wife. *Checchi et ux. v. Powell*, 6 B. & C. 253.

If a party be taken or charged in execution, and die, the other party may sue out execution against his lands or goods, 21 J. 1, c. 24. See *Farncombe v. Kent*, 2 Dowl. 464, and

*see Ex p. Lord of the Manor of Wakefield*, 11 *Law J.*, 41, qh. Or if the party who has him in execution die intestate, and none of his relations will take out administration, the court will discharge the party out of custody, the rule nisi being served on the next of kin. *Parkinson v. Horlock*, 2 *New Rep.* 240.

*Its effect in error.*] If the plaintiff in error, or one of several plaintiffs in error, die before errors assigned, the writ is thereby abated; 2 *Saund.* 101, n. *See Kinnaird v. Lyall*, 7 *East*, 296; but not, if he die after errors assigned. 2 *Saund.* 101, o. And in no case does a writ of error abate, by the death of the defendant, or one of several defendants, in error. *Id.* *Clark v. Rippon*, 1 *B. & A.* 586.

*Its effect in other cases.*] In what cases bail are discharged by the death of their principal, *see ante*, p. 207. In what cases the death of a party to a reference, will amount to a revocation of the submission, *see vol. 2*, tit. "Arbitration." And as to its effect upon proceedings under the interpleader act, *see Lambirth v. Barrington*, 4 *Dowl.* 126.

## 2. Marriage of a feme, party.

The marriage of a feme sole, plaintiff, pending the suit, does not actually abate it, but merely renders it abateable; *Bro. Abr. Brief*, pl. 232. *Lee v. Maddox*, 1 *Leon*, 168; and therefore the defendant must plead it, if he would take advantage of it. *Morgan v. Painter*, 6 *T. R.* 265. *Hollis v. Freer*, 5 *Dowl.* 47. But if a feme sole obtain judgment, and marry before execution, there must be a *scire facias*, to make her husband a party to the record, before execution is sued out. 2 *Saund.* 72 k. And if a feme sole, plaintiff or defendant in error, die pending the writ, the writ is thereby abated. *See 2 Str.* 1015, 880. 1 *Str.* 638. A warrant of attorney given to a feme sole, however, is not affected by her subsequent marriage; but the court, on a proper affidavit of the marriage, the due execution of the warrant of attorney, and the non-payment of the debt, will allow the judgment to be entered up in the name of the husband and wife. *Metcalf et ux. v. Boote*, 6 *D. & R.* 46.

The marriage of a feme sole, defendant, pending a suit, does not actually abate it, but renders it only abateable. And if the plaintiff obtain interlocutory judgment against a feme sole, and she then marry, he may proceed to final judgment against her; and he may then either sue out a *scire facias* and make the husband a party to the record, so as to have execution against both, 2 *Saund.* 72 k, or he may sue out a *ca. sa.* against the wife alone. *Cooper v. Hunchin*, 4 *East*, 521. So where a feme sole, defendant in ejectment, married before trial, the court held that a judgment, writ of possession and *fi. fa.* against the

wife alone, were not irregular, and refused to set them aside. *Doe v. Butcher*, 3 M. & S. 557. So, where a feme sole defendant married before declaration, and the plaintiff notwithstanding proceeded to final judgment against her, and took her in execution, the court refused to discharge her, it not being sworn that she had no separate property. *Evans v. Chester*, 6 Dowl. 140. But if a feme sole give a warrant of attorney, her marriage afterwards, before judgment is entered up, will be a revocation of it. 1 Salk. 117.

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## APPENDIX.

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*Forms of proceedings in the courts of law at Westminster.*

### SHERIFF.

*Affidavit, to set aside regular proceedings against the sheriff, or upon a bail bond.*

*Affidavit by the defendant.*

"In the Queen's Bench" [or "Exchequer of Pleas," &c.]

The Queen against the sheriff of —, in a cause

Between John Nokes, plaintiff,  
and

Joseph Styles, defendant.

Joseph Styles, of —, grocer, the above-named defendant, maketh oath and saith, that he this deponent was on —, arrested at the suit of the above-named plaintiff, upon a writ of *capias* sued out in this action, and that he on — gave a bail bond to the officer of the sheriff of — by whom he was so arrested, and was thereupon discharged out of custody. And this deponent further saith that special bail hath since been put in in this action for this deponent, and which said bail have this day been duly perfected. And this deponent saith, [that on — last, an attachment issued out of this honourable court against the said sheriff of —, for not having obeyed the rule to bring in the body of this deponent, as this deponent has heard and verily believes. "Or," that the said John Nokes, the above-named plaintiff, on or about the — day of — instant, hath taken an assignment of the said bail bond, as this deponent hath heard and verily believes, and hath since commenced an action upon the same against this deponent.] And deponent further saith, that he hath a good defence to this action upon the merits. *If the application be to set aside proceedings on the bail bond, this affidavit is merely intituled, either in the original action, or in the action on the bail bond, and not "the Queen against the*

sheriff of," &c. When the affidavit is intituled in the action on the bail bond, the necessary alterations must be made in referring to it. See ante, pp. 39, 172.

*Affidavit by the bail.*

In the Queen's Bench [&c., as above.

A. B. of —, tailor, and C. D. of —, livery-stable keeper, severally make oath and say, that J. S. the above-named defendant, was, on or about the — last, arrested in this action at the suit of the above-named plaintiff, and that these deponents, together with the said J. S. after the said arrest, on —, duly executed a bail bond to the sheriff of — in this action, and the said J. S. was thereupon discharged out of custody. And these deponents further say, that special bail hath since been put in in this action, for the above-named defendant, and [which said bail have this day been duly perfected, "or" the said defendant hath, on — last, been duly rendered in discharge of his said bail in this action.] And these deponents further say, that [on — last, an attachment issued out of this honourable court against the said sheriff of —, for not having obeyed the rule to bring in the body of the said J. S., as these deponents have severally heard and verily believe. Or, the said John Nokes, the above-named plaintiff, on or about the — day of — last, hath taken an assignment of the said bail bond, as these deponents have heard and verily believe, and hath since commenced an action upon the same against these deponents.] And these deponents further say, that this application is really and truly made on the part of these deponents, as bail for the said J. S. at their own expense, and for their indemnity only, and without collusion with the said J. S. the above-named defendant. See ante, pp. 39, 172.

ARTICLED CLERKS.

*Affidavit of the execution of the articles.*

In the Queen's Bench.

J. K. of — [gentleman], maketh oath and saith, that by articles of agreement, bearing date the — day of — last past, and made between C. D. of —, gentleman, one of the attorneys of Her Majesty's court of [Queen's Bench, Common Pleas "or" Exchequer] at Westminster, of the one part, and E. F. of — and G. F. of — son of the said E. F. of the other part, the said G. F. for the considerations therein mentioned did put, place and bind himself clerk to the said C. D., to serve him in the profession of an attorney-at-law, from the

day of the date of the said articles, for the term of five years thence next ensuing and fully to be complete and ended; which said articles were in due form of law executed by the said C. D., E. F., and G. F. on the day of the date thereof, in the presence of this deponent and of one H. J. of —, and that the names of J. K. and H. J. set and subscribed to the said articles as witnesses to the due execution thereof, are the proper handwriting of this deponent and of the said H. J.

Sworn, &c.

J. K.

[*Sec ante*, p. 41.]

*Notice of intention to apply for admission.*

Notice is hereby given, that G. F. of — intends to apply next — term to be admitted an attorney of Her Majesty's court of ["Queen's Bench," or "Common Pleas," or "Exchequer,"] and that he served [part of] his clerkship, under articles, to C. D. of — attorney-at-law, [and the residue thereof, under articles, to L. M. of — attorney-at-law, or that he is now serving the residue thereof, under articles, to L. M. of — attorney-at-law,] and that during the whole of the last twelve months he resided at —, and served under his said [last mentioned] articles at — aforesaid. Dated, &c.

G. F.

[*See ante*, p. 49.]

*Affidavit of service under the articles, and of giving the notice.*

In the Queen's Bench.

G. F. of — in the county of — gentleman, and Y. Z. of — clerk to E. H. of — gentleman, severally make oath and say, and first this deponent G. F. for himself saith, that in pursuance of the articles of clerkship hereto annexed, bearing date the — day of — 18 —, he hath really and truly served and was employed by C. D. of — in the county of — one of the attornies of Her Majesty's court of Queen's Bench at Westminster, as his clerk, in the practice of an attorney and solicitor, from the day of the date of the said articles inclusive to the — day of — 18 — inclusive, being [a period of — years, — months and — days. And that in pursuance of an indenture of assignment of the said articles also hereto annexed, bearing date the — day of — 18 —, he this deponent hath really and truly served and was employed by H. I. of — in the county of —, in the said assignment mentioned, one other of the attornies of Her Majesty's court of Queen's Bench at Westminster, as his clerk, in the practice of an attorney and solicitor, from the day of the date of the said indenture of assignment inclusive, to the — day of 18 —.



inclusive, being a period of — years, — months, and — days, making in the whole] the full term of five years. And this deponent Y. Z. for himself saith, that he did, before the commencement of — term now last past, affix a notice in writing, containing the name and then place of abode of the said G. F., and the name and place of abode [of the said C. D. the master, "or" as well of the said C. D. as of the said H. I. the respective masters] of the said G. F. in the Queen's Bench office, where the like notices are usually affixed, reporting that the said G. F. intended to apply in the then next — term, to be admitted an attorney of Her Majesty's court of Queen's Bench at Westminster. And that he this deponent did, before the commencement of — term now last past, enter a like notice in the book kept for that purpose at the chambers of each of the judges of the said court. And that he did also, three days at least previous to — term now last past, leave a like notice, containing in addition the place or places of abode or service of the said G. F. for the last preceding twelve months, with the master of this honourable court, by leaving such notice with his clerk, at the said master's office in the Temple. And this deponent G. F. for himself further saith, that if any or either of the said notices were or was afterwards removed, cancelled or defaced, it was done without the privity or consent of this deponent.

Sworn by both the deponents, G. F. }

and Y. Z. at —  
this — day of — 18  
Before

G. F.  
Y. Z.

[See ante, pp. 52, 42.]

*Affidavit of the payment of the stamp duty.*

In the Queen's Bench, [&c.

G. F. of — in the county of —, gentleman, maketh oath and saith, that the stamp duty of one hundred and twenty pounds was paid in respect of certain articles of clerkship, bearing date the — day of — 18, and made between C. D. of — in the county of — gentleman, one of the attorneys of her majesty's court of Queen's Bench at Westminster, of the one part, and E. F. of —, in the county of — gentleman, and this deponent of the other part, as appears by the stamp impressed thereon; and that the said articles were duly executed by the respective parties thereto, on the day of the date thereof, and were duly registered on the — day of — 18, as appears by the certificate of the proper officer indorsed thereon. [And this deponent further saith, that the stamp duty of one pound fifteen shillings, was paid in respect of a certain assign-

— ant of the said articles, bearing date the — day of —  
 the said —, and made between the said C. D. of the first part, the  
 of said — E. F. and this deponent of the second part, and H. I. of  
 the said — in the county of —, gentleman, one of the attor-  
 and judges of her majesty's court of Queen's Bench at Westminster,  
 place of the third part, as appears by the stamp impressed thereon;  
 and that the said assignment was duly executed by the respec-  
 tive parties thereto, on the day of the date thereof, and was  
 duly registered on the — day of — 18 —, as appears  
 by the certificate of the proper officer indorsed thereon.]

Sworn at —  
 this — day of — 18 — } G. F.  
 Before  
 [See ante, p. 52.]

## ATTORNIES.

*Affidavit for the re-admission of an attorney.**In the Queen's Bench.*

G. F. of — in the county of —, gentleman, maketh  
 oath and saith that he was duly admitted an attorney of this  
 honourable court, in — term 1830, and duly took out his  
 certificate for that year; and that he continued to take out  
 his certificate every year from that time until the year 1837,  
 when [owing to illness, or as the case may be] "this deponent  
 ceased to practise as an attorney. And this deponent  
 further saith, that in the year 1839, he [became managing  
 clerk to S. T. of —, solicitor, and hath continued to serve  
 him as such clerk from thence to the present time," or other-  
 wise accounting for the manner in which he has been employed  
 since he ceased to take out his certificate;] But this deponent  
 saith that he hath not practised as an attorney or solicitor, on  
 his own account, or for his own benefit, from the time he so  
 ceased to take out his certificate hitherto; and that he is now  
 desirous to be re-admitted an attorney of this honourable  
 court, for the purpose of resuming his practice as such attorney.

Sworn, &c.

\* \* \* If the party have practised, the affidavit must state it,  
 and must be framed so as to bring the case within the decisions  
 mentioned ante, pp. 56, 57.

*Notice of intention to apply to be re-admitted.*

Notice is hereby given, that G. F., late of —, but now of  
 —, gentleman, intends to apply on the — day of —  
 next, being the last day of — term, to be re-admitted an

attorney of her majesty's court of [Queen's Bench]. Dated  
 this — day of — 18 . G. F.  
 [See ante, p. 57.]

## PROCESS AND APPEARANCE.

*Writ of summons.*

Printed copies of this writ may be had at the stationer's;  
 and it is therefore unnecessary here to give a form of it. See  
 ante, p. 100.

*Indorsement thereon of the attorney's name, &c.*

This writ was issued by E. F. of —, attorney for the said  
 A. B. Or, this writ was issued in person by A. B. who resides  
 at [mention the city, town, or parish, and also the name of the  
 hamlet, street, and number of the house of the plaintiff's resi-  
 dence, if any such.] See ante, p. 104.

*The like by an agent.*

"This writ was issued by John Smith, of No. 3, Elm Court,  
 in the Temple, London, agent for James Walker of Beverley, in  
 the East riding of the county of York, attorney for the said John  
 Nokes." See ante, p. 105.

*Indorsement thereon of the debt, &c.*

The plaintiff claims [30*l.* 10*s.*] for debt, and [1*l.* 17*s.* 6*d.*]  
 for costs; and if the amount thereof be paid to the plaintiff or  
 his attorney within four days from the service hereof, further  
 proceedings will be stayed. See ante, p. 105.

*Præcipe for the writ.*

Middlesex: Writ of summons for *John Nokes* against *Joseph Styles*, of Somer's Place, Hendon, in the county of Middlesex, in an action [on promises.]

A. B., attorney,  
 —, 1843.

[See ante, p. 106.]

*Alias or pluries writ of summons.*

Victoria, [&c.] To Joseph Styles of — in the county of —, late of — in the county of [*the original county*], greeting : We command you as before [*or often*] we have commanded you, [*&c. as in the ordinary form. R. G. M. 3 W. 4, s. 7. These writs are sued out in the same manner as the first writ of summons. See ante, p. 108.*]

*Writ of distringas.*

Printed copies of this writ may be had at the stationer's; and it is therefore unnecessary here to give a form of it. As to the affidavit necessary to obtain it, *see ante*, p. 110.

*Indorsement thereon.*

This writ was issued by John Smith, of No. 3, Elm-court, Temple, attorney, for the within-named John Nokes.

*Or if by an agent :* "This writ was issued by John Smith, of No. 3, Elm Court, Temple, attorney, agent for James Walker, of Beverley, in the east riding of the county of York, attorney, for the within-named John Nokes.

*Or if by the plaintiff in person :* "This writ was issued in person by John Nokes, who resides at," [*mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such.*]

*Further indorsement required on the copy of the writ, by R. G. H. 2 W. 4, r. 2, where the action is for a debt: ]* The plaintiff claims [30*l.* 10*s.*] for debt, and [5*l.* 4*s.*] for costs; and if the amount thereof be paid to the plaintiff [or his attorney] within four days from the service hereof, further proceedings will be stayed." *See ante*, p. 113.

*Appearance.—In person.*

John Nokes, plaintiff, against Joseph Styles, [and others]	}	The defendant Joseph Styles appears in person.
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*By attorney.*

John Nokes, plaintiff, against Joseph Styles, [and others]	}	E. F. attorney for Joseph Styles, appears for him.
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*Where the plaintiff appears for the defendant.*

<p>John Nokes, plaintiff,                     <i>against</i> Joseph Styles, [and others]</p>	}	<p>G. H. attorney for the plaintiff, appears for the defendant, Joseph Styles, according to the statute.</p>
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[*See ante*, p. 115.]

*Affidavit of service of the writ of summons.*

In the Queen's Bench.

Between John Nokes, plaintiff,  
                    and

Joseph Styles, defendant.

John Dunn, clerk to Henry Smith, of Furnival's Inn, Holborn, in the county of Middlesex, gentleman, attorney for the above-named plaintiff, maketh oath and saith, that he did, on the — day of — instant, personally serve Mr. Joseph Styles, the above-named defendant, with a true copy of a writ of summons, which appeared to this deponent to be regularly issued out of this honourable court, at the suit of the above-named plaintiff, against the above-named defendant, and bearing date the — day of — last past. And this deponent further saith, that after having so served the said defendant with the said writ as aforesaid, this deponent, on the — day of the said month of —, did indorse on the said writ the day of the week and month of such service; and which said indorsement is in the words and figures following; that is to say ["served the defendant with a copy of this writ, on Friday the — day of —, 1843, John Dunn," or as the indorsement may be.]

Sworn, &c. *See ante*, pp. 116, 117.

#### AFFIDAVIT FOR A CAPIAS.

"In the Queen's Bench," [or "Common Pleas," or "Exchequer of Pleas."]

John Nokes, of Henrietta Street, Covent Garden, in the county of Middlesex, grocer, maketh oath and saith, that Joseph Styles is justly and truly indebted unto this deponent in the sum of — pounds, [for goods sold and delivered by this deponent to the said Joseph Styles, and at his request.] And this deponent further saith that [*here state the circumstances necessary to bring the case within stat. 1 & 2 Vict. c. 110, s. 3, ante*, p. 125, *adding*] and this deponent verily believes that the said Joseph Styles is about to quit England, unless he be forthwith apprehended.

J. N.

"Sworn at — in the county of — this — day of — 18 , before me." *Or if sworn in London, before the officer who issues the process, then thus:* "Sworn at the — office, this — day of — 18 , before me."

*Quaker's affirmation.*

"In the Queen's Bench," [&c.

John Nokes, of Henrietta Street, Covent Garden, in the county of Middlesex, grocer, being one of the people called Quakers, doth solemnly affirm, that Joseph Styles is justly and truly indebted unto this affirmant in the sum of [*&c. as above*] affirmed at [*&c. as above.*]

*For goods &c. sold and delivered.]* "For goods," (or specifying the articles) "sold and delivered by this deponent to the said Joseph Styles, and at his request."

"For fixtures of and in a certain dwelling-house, sold and delivered by this deponent to the said Joseph Styles, and at his request."

"For medicines and other things administered, applied and delivered, found and provided by this deponent, to and for the said Joseph Styles, and at his request."

"For a certain messuage, lands and premises, with the appurtenances, bargained, sold and released by this deponent to the said Joseph Styles, and at his request."

*Work and labour.]* "For work and labour done and performed by this deponent for the said Joseph Styles, and at his request."

"For work and labour, care, diligence and attendance, done, performed and bestowed by this deponent, as an attorney and solicitor, in and about the [prosecuting, defending and soliciting of certain causes, suits and businesses] for the said Joseph Styles, on his retainer and at his request, and for certain fees due and payable from the said Joseph Styles to this deponent in respect thereof."

"For work and labour, care, diligence and attendance, done, performed and bestowed by this deponent, as a surgeon and apothecary, in and about the healing and curing of the said Joseph Styles [and others of his family] of divers diseases and maladies, at the request of the said Joseph Styles, and also for medicines and other things administered, applied and delivered, found and provided, by this deponent, to and for the said J. S. [and others of his family] at his like request."

*Money lent.*] "For money lent and advanced by this deponent to the said Joseph Styles, and at his request."

*Money paid, laid out and expended.*] "For money paid, laid out and expended by this deponent for the said Joseph Styles, and at his request."

*Money had and received.*] "For money had and received by the said Joseph Styles, to and for the use of this deponent."

*Hire of goods, &c.*] "For the use and hire of a certain horse and chaise, by this deponent let to hire and delivered to the said Joseph Styles, and at his request."

*Agistment.*] "For the agisting, depasturing and keeping of certain cattle by this deponent for the said Joseph Styles, and at his request."

*Use and occupation.*] "For the use and occupation of a certain messuage, lands and premises of this deponent held and enjoyed by the said Joseph Styles, as tenant thereof to this deponent, for one year now elapsed."

*Account stated.*] "For so much money due from the said Joseph Styles to this deponent, upon the balance of an account stated and settled by and between the said J. S. and this deponent."

*Bills of exchange, Payee v. Acceptor.*] "On a certain bill of exchange for the payment of £——, drawn by A. B. upon and accepted by the said Joseph Styles, payable to this deponent, and which said bill of exchange is now overdue and unpaid."

*Indorsee v. Acceptor.*] "As indorsee of a certain bill of exchange for the payment of £——, drawn by one A. B. upon and accepted by the said Joseph Styles, payable to the said A. B. or his order, and by the said A. B. indorsed to this deponent; and which said bill of exchange is now overdue and unpaid."

*Drawer v. Acceptor.*] "On a certain bill of exchange for the payment of £——, drawn by this deponent for a valuable consideration, upon and accepted by the said Joseph Styles, and payable to this deponent; which said bill of exchange is now overdue and unpaid. See *Walmsley v. Macey*, 2 Brod. & B. 338.

*Indorsee v. Drawer.*] "As indorsee of a certain bill of exchange for the payment of £——, drawn by the said Joseph Styles, upon and accepted by one A. B. payable to the order

of the said J. S. and by him indorsed to this deponent; which said bill of exchange hath not been paid, when due, by the said acceptor thereof, and the same is now overdue and unpaid."

*Indorsee v. Indorser.*] "As indorsee of a certain bill of exchange for the payment of £—, drawn by one A. B. upon and accepted by one C. D. payable to the order of the said A. B. and by the said A. B. indorsed to the said Joseph Styles, and by the said Joseph Styles indorsed to this deponent; which said bill of exchange hath not been paid, when due, by the said acceptor thereof, and the same is now overdue and unpaid."

*Promissory note, Payee v. Maker.*] "On a certain promissory note for the payment of £—, drawn by the said Joseph Styles, payable to this deponent, and now overdue and unpaid."

*Indorsee v. Maker.*] "As indorsee of a certain promissory note for the payment of £—, drawn by the said Joseph Styles, payable to one A. B. or his order, and by the said A. B. indorsed to this deponent; and which said promissory note is now overdue and unpaid." *Ante*, p. 143.

*Indorsee v. Indorser.*] "As indorsee of a certain promissory note for the payment of £—, drawn by one A. B. payable to the said Joseph Styles, and by the said Joseph Styles indorsed to this deponent; which said promissory note hath not been paid, when due, by the said A. B. and the same is now overdue and unpaid. *Ante*, p. 143.

*Bond.*] "For principal and interest due on a bond, bearing date the — day of — in the year of our Lord —, and made and entered into by the said Joseph Styles to this deponent, in the penal sum of — pounds, conditioned for the payment of — pounds, with lawful interest for the same, at a day now past."

*Mortgage or covenant.*] "Upon and by virtue of a certain indenture [of mortgage,] bearing date the — day of — in the year of our Lord —, and made between the said Joseph Styles of the one part, and this deponent of the other part, whereby the said Joseph Styles covenanted to pay to this deponent the sum of — pounds, at a day now past; and which said sum is now due and unpaid."

*Interest.*] "For interest, agreed by the said Joseph Styles, to be paid by him unto this deponent upon certain sums of money [lent and advanced by this deponent to the said J. S.]



or "paid, laid out and expended by this deponent for the said J. S. and at his request," or "due and owing from the said J. S. to this deponent."]

*Two or more causes of action.*] "In the sum of — pounds, for goods sold and delivered by this deponent to the said Joseph Styles, and at his request; and also in the sum of — for meat, drink, washing and lodging, and other necessities, by this deponent found and provided for the said J. S., and at his request; and also in the sum of — for work and labour done and performed by this deponent for the said J. S., and at his request," &c.

*By an executor.*] "John Nokes, of —, grocer, executor of the last will and testament of A. B. deceased, maketh oath and saith, that Joseph Styles is justly and truly indebted to this deponent, as executor as aforesaid, in the sum of — pounds, for goods sold and delivered by the said A. B. in his lifetime, to the said J. S. and at his request, as appears by the books of the said A. B. and as this deponent verily believes."

*By assignee of a bankrupt.*] "John Nokes, of —, grocer, assignee of the estate and effects of A. B. a bankrupt, maketh oath and saith, that Joseph Styles is justly and truly indebted to this deponent, as assignee as aforesaid, in the sum of — pounds, for goods sold and delivered by the said A. B. before his bankruptcy to the said J. S. and at his request, as appears by the books of the said A. B. and as this deponent verily believes."

*For a debt due to husband and wife.*] "Ann Nokes, wife of John Nokes, of —, grocer, maketh oath and saith, that Joseph Styles is justly and truly indebted to this deponent and her husband, the said J. N. in the sum of — pounds, for goods sold and delivered to the said J. S. and at his request, by this deponent before her intermarriage with the said J. N."

*By surviving partner.*] "John Nokes, of —, grocer, maketh oath and saith, that Joseph Styles is justly and truly indebted to this deponent, in the sum of — pounds, for goods sold and delivered by this deponent, and W. N. his late partner, in his lifetime, now deceased, and whom this deponent hath survived, to the said Joseph Styles, and at his request."

*By assignee of a debt.*] "For principal and interest due to him, as assignee of a certain bond, bearing date the — day of —, in the year of our Lord —, and made and entered into by the said Joseph Styles to one A. B. in the penal sum of — pounds, conditioned for the payment of — pounds,

at a day now past; and which said bond, with the money due thereon, has since been duly assigned by the said A. B. to this deponent; and the said sum of — pounds, with interest for and upon the same, is now due and unpaid."

[*Ante*, p. 143.]

CAPIAS.

The writ and capias may be had printed at the stationer's, so that it is unnecessary to give the form. The following are the forms of the

*Indorsements thereon.*

"Bail for — pounds, by order of —" [*naming the judge making the order*] "dated this — day of —." *This indorsement is required by stat. 1 & 2 Vict. c. 110, sch. No. 1.*

"This writ was issued by E. F. of —, attorney for the plaintiff [*or* plaintiffs] within-named." Or "This writ was issued in person by the plaintiff within-named, who resides at" [*mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be.*] *The form of this indorsement is given by stat. 1 & 2 Vict. c. 110, sch. No. 1.*

[*Ante*, pp. 155, 156.]

*Indorsement, when the writ is issued by an agent.*

"This writ was issued by John Smith, of No. 3, Elm Court, Temple, agent for James Walker of Beverley, in the east riding of the county of York, attorney for the plaintiff within named."

[*Ante*, p. 156.]

*Præcipe.*

Middlesex: capias for John Nokes against Joseph Styles of Oxford-street, in the county of Middlesex, in an action [on promises "*or*" of debt] for 50*l.* Oath for 50*l.* by affidavit filed.

A. B. attorney, 1843.

[*Ante*, p. 157.]

*Alias and pluries capias.*

Victoria, by the grace of God, of the united kingdom of Great Britain and Ireland, Queen, defender of the faith, to the sheriff

of — greeting : We command you, as before [*or often*] we have commanded you, that you omit not [*&c. as in the ordinary writ.*] See 2 *W.* 4, c. 39, sch. No. 4.  
[*Ante*, p. 159.]

*Testatum copias.*

Victoria, &c., to the sheriff of —, greeting : We command you, as heretofore we have commanded the sheriff of —, that you omit not [*&c. as in the ordinary writ.* R. G. M. 3 *W.* 4, s. 7.]

[*Ante*, p. 159.]

TOWN BAIL.

*Ordinary notice of bail.*

In the Queen's Bench, [*&c.*

Between, [*&c.*

Take notice that special bail was this day put in for the defendant in this cause, before the honourable Mr. Justice —, at his chambers, Serjeants' Inn, Chancery Lane ; and that the names and additions of such bail are, A. B. of No. 14, Oxford-street, in the county of Middlesex, grocer, and C. D. of No. 240, in the Strand, in the same county, silversmith, that the said A. B. and C. D. have been resident at the places herein above described respectively, during the whole of the last six months, and that they are housekeepers there respectively [*or as the case may be.*] Dated the — day of — 1843.

To Mr. G. H.

Plaintiff's attorney.

Yours, &c

E. F.

Defendant's attorney.

[*Ante*, p. 178.]

*Affidavit of sufficiency.*

In the [*&c.*

Between, [*&c.*

A. B. one of the bail for the above named defendant, maketh oath and saith, that he is a housekeeper [*or freeholder, as the case may be*] residing at [*describing particularly the street or place, and the number, if any*] ; that he is worth property to the amount of — (*the amount required by the practice of the courts*) over and above what will pay all his just debts ; *if bail in any other action, add* "and every other sum for which he is now bail ;" R. G. H. 2 *W.* 4, s. 19 ; that he is not bail for any defendant, except in this action, [*or, if bail in any other action or actions, add,* "except for C. D. at the suit of E. F. in

the court of — in the sum of £—; for G. H. at the suit of J. K. in the court of — in the sum of £—," *specifying the several actions, with the courts in which they are brought, and the sums in which the deponent is bail;*] that the deponent's property, to the amount of the said sum of £— [*and if bail in any other action or actions, "of all other sums for which he is now bail as aforesaid"*] consists of [*here specify the nature and value of the property in respect of which the bail proposes to justify, as follows:—*"stock in trade, in his business of —, carried on by him at —, of the value of £—; of good book debts owing to him to the amount of £—; of furniture in his house at —, of the value of £—; of a freehold or leasehold farm, of the value of £—, situate at —, occupied by —, or of a dwelling-house of the value of £— situate at —, occupied by —," or of other property, *particularizing each description of property, with the value thereof;*] and that the deponent hath, for the last six months resided at — [*describing the place or places of such residence.*]

Sworn, &c.

[*Ante*, p. 181.]

*Notice of putting in and justifying bail at the same time.*

In the [&c.

Between, [&c.

Take notice, that A. B. of No. 3, Red Lion-street, Holborn, butcher, and C. D. of No. 40, Fleet-street, carpenter, will on Monday next, the 20th day of January instant, be put in as special bail for the above named defendant in this cause, in the court of —, at Westminster Hall, in the county of Middlesex; and that the said A. B. and C. D. will, at the same time justify themselves in open court at Westminster Hall aforesaid, as good and sufficient bail in this cause for the said defendant. And take notice also, that the said A. B. resided at No. 20, in Brownlow-street, Holborn, from the — to the 25th day of December last, at which latter time he removed to No. 3, Red Lion-street, Holborn, aforesaid, where he has ever since been resident, and is a housekeeper there; and that the above named C. D. has been resident at No. 40, Fleet-street aforesaid, during the whole of the last six months, and is a housekeeper there," [*or as the fact may be.*]

Dated, &c.

[*Ante*, p. 183.]

*Notice of exception.*

In the [&amp;c.

Between, [&amp;c.

Take notice that I have excepted against the bail put in for the defendant in this cause.

To Mr. C. D.

Yours, &amp;c.

Defendant's attorney.

A. B.

Plaintiff's attorney.

[*Ante*, p. 183.]*Notice of justification.*

In the [&amp;c.

Between, [&amp;c.

Take notice, that L. M. and O. P. the bail already put in for the defendant, and of whom you have before had notice, will, on — next, justify themselves in open court at Westminster Hall, in the county of Middlesex, as good and sufficient bail for the defendant in this cause, [*adding in the Common Pleas, the description of the bail, in the same manner as in the notice of bail.*] Dated the — day of — 1843.

To Mr. A. B.

Yours, &amp;c.

Plaintiff's attorney.

C. D.

Defendant's attorney.

[*Ante*, p. 187.]*Affidavit of service thereof.*

In the [&amp;c.

Between, [&amp;c.

J. R. clerk to C. D. of —, gentleman, attorney for the above-named defendant, maketh oath and saith, that he this deponent did, on the — day of — instant, before eleven o'clock in the forenoon,\* serve Mr. A. B. the attorney for the above-named plaintiff, with a true copy of the notice hereunto annexed, by delivering the same to and leaving it with a clerk of the said Mr. A. B. at his chambers in Paper Buildings, in the Temple. [*Or if the service were on the attorney personally, then from the asterisk thus: personally serve Mr. A. B. the attorney for the above-named plaintiff, with a true copy of the notice hereunto annexed.*]

J. R.

Sworn, [&amp;c.

[*Ante*, p. 188.]

## COUNTRY BAIL.

*Affidavit of justification.*

In the [&amp;c.]

J. R.

Between, [&amp;c.]

L. M. of ——— butcher, and O. P. of ——— carpenter, bail in this action for the above-named defendant, severally make oath and say, and first this deponent, L. M. for himself saith, that he is a housekeeper [or "freeholder," as the case may be,] residing at [describing particularly the street or place, and the number, if any,] and that he this deponent is worth the sum of [double the amount indorsed on the writ,] over and above what will pay his just debts, and over and above every other sum for which he is now bail. And this deponent O. P. for himself saith, that he is a housekeeper, residing at ——— and that he this deponent is worth the sum of ——— over and above what will pay his just debts, and that he is not bail in any other action.

The above-named deponents, L. M. & O. P. }  
 were severally sworn at ——— in the county of } L. M.  
 ——— this ——— day of ——— 1843, before me, ——— } O. P.  
 [Ante, p. 195.]

*Affidavit of caption.*

In the [&amp;c.]

Between, [&amp;c.]

J. R. clerk to E. F. of ———, gentleman, the attorney for the above-named defendant, maketh oath and saith, that the recognizance of bail or bail-piece hereunto annexed, was duly acknowledged by L. M. of ———, butcher, and O. P. of ———, carpenter, the bail therein named, before O. R. gentleman, the commissioner who took the same, in this defendant's presence, the ——— day of ——— instant.

Sworn at ———, in the county of }  
 ——— this ——— day of ———, } J. R.  
 1843, before me, ——— }  
 [Ante, p. 196.]

*Notice of country bail, in the Queen's Bench.*

In the Queen's Bench.

Between, [&amp;c.]

Take notice, that the bail-piece in this cause, together with the affidavit of the due taking thereof was this day filed with the Honourable Mr. Justice ———, at his chambers in Serjeant's Inn, Chancery-lane, London. That the names of the bail are

L. M. of —, butcher, and O. P. of —, carpenter; and that the said L. M. resided at —, from —, to the 25th day of December, 1842, at which latter time he removed to —, where he has ever since been resident, and is a housekeeper there; and that the said O. P. has been resident at — aforesaid, during the whole of the last six months, and is a housekeeper there. Dated the — day of —, 1843.

To G. A.

Plaintiff's agent.

Yours, &c.

I. K.

Defendant's agent.

[*Ante*, p. 196.]

*The like notice, in the Common Pleas or Exchequer.*

In the [&c.

Between, [&c.

Take notice that special bail was, on the — day of — instant, put in in this cause for the above-named defendant, before O. R. gentleman, a commissioner appointed to take special bails in and for the county of —; and that the same have been allowed by the Honourable Mr. [Justice or Baron] —; and that the bail-piece, together with the affidavit of the due taking thereof, is filed in the office of the masters of this court. And take notice, that the names of the said bail are [&c. as in last form.] Dated, [&c.

[*Ante*, p. 196.]

#### RENDER IN DISCHARGE OF BAIL.

*Notice of render to the Queen's prison.*

In the Queen's Bench.

Between, [&c.

Take notice that the above-named defendant did this day render himself in discharge of his bail at the suit of the above-named plaintiff, and was thereupon committed by Mr. Justice —, to the Queen's prison, there to remain until, &c. Dated, [&c.

To Mr. E. F.

The plaintiff's attorney,  
or agent.

G. H.

The defendant's attorney.

[*Ante*, p. 213.]

*The like, to the county gaol.*

In the Queen's Bench.

Between, [&c.

Take notice that the above-named defendant, by order of Mr. Justice —, was this day rendered by his bail, in their

discharge, at the suit of the above-named plaintiff, to the common gaol of the county of —, in which county the said plaintiff was arrested, and that the said order of Mr. Justice — was then lodged with — the gaoler of such county gaol, in whose custody the said defendant now is, by virtue of the said order. Dated, [&c.]

[*Ante*, p. 214.]

#### BANKRUPTS.

*Proceedings against traders under stat. 1 & 2 Vict. c. 110.*

#### *Affidavit.*

A. B. of — street, in the city of London, merchant, maketh oath and saith that G. H. of — street, in the said city of London, grocer, is justly and truly indebted unto him this deponent [and to C. D. his partner] in the sum of — pounds and upwards; and the said A. B. saith that he verily believes that the said G. H. is a trader within the meaning of the laws now in force respecting bankrupts. *See ante*, p. 216.

#### *The like by two or more creditors.*

A. B. of — merchant, C. D. of — grocer, and E. F. of — carpenter, severally make oath and say, and first this deponent A. B. for himself saith that G. H. of — grocer, is justly and truly indebted unto him this deponent, in the sum of —; and this other deponent C. D. for himself saith that the said G. H. is justly and truly indebted unto him this deponent, in the sum of —; and this other deponent E. F. for himself saith that the said G. H. is justly and truly indebted unto him this deponent in the sum of —: and these several deponents severally further say, that they verily believe that the said G. H. is a trader within the meaning of the laws now in force respecting bankrupts. *See ante*, p. 216.

#### *Notice of having filed the affidavit.*

Mr. — take notice that I have this day filed in Her Majesty's court of bankruptcy, an affidavit of the debt due from you to me, a copy of which is hereunto annexed, and I hereby require you immediately to pay me the said debt, amounting to £—.

Dated, &c

[*See ante*, p. 216.]



## DECLARATION.

*Declaration, after summons.*

*Venue.* A. B. by E. F. his attorney [or in his own proper person] complains of C. D. who has been summoned to answer the said A. B. &c.

[*Ante*, p. 221.]

*Common counts in assumpsit.*

Whereas the defendant on — was indebted to the plaintiff in £—, for the price and value of goods then bargained and sold [or sold and delivered] by the plaintiff to the defendant, at his request :

And in £—, for the price and value of work then done, and materials for the same provided, by the plaintiff for the defendant, and at his request :

And in £—, for money then lent by the plaintiff to the defendant, at his request :

And in £—, for money then paid by the plaintiff for the use of the defendant, and at his request :

And in £—, for money then received by the defendant for the use of the plaintiff :

And in £—, for money found to be due from the defendant to the plaintiff, on an account then stated between them.

*General conclusion.*

And the defendant afterwards on, &c. in consideration of the premises respectively, then promised to pay the said several monies respectively to the plaintiff on request ; yet he hath disregarded his promises, and hath not paid any of the said monies, or any part thereof : to the plaintiff's damage of £— ; and thereupon he brings suit, &c. *Ante*, p. 221.

*Common counts in debt.*

Whereas the defendant on — was indebted to the plaintiff in £—, for [the price and value of goods then sold and delivered by the plaintiff to the defendant] at his request :

And in £—, for [the price and value of work then done, and materials for the same provided by the plaintiff for the defendant], and at his request :

And in £—— for money then lent by the plaintiff to the defendant, at his request :

And in £—— for money then paid by the plaintiff for the use of the defendant, and at his request :

And in £—— for money then received by the defendant for the use of the plaintiff :

And in £—— for money found to be due from the defendant to the plaintiff, on an account then stated between them : which said several sums of money respectively were to be paid by the defendant to the plaintiff on request ; whereby, and by reason of the non-payment thereof, an action hath accrued to the plaintiff to demand, and have of and from the defendant, the said several sums of money respectively ; yet the defendant has not paid any of the said sums of money, or any part thereof, to the plaintiff's damage of 5*l.* ; and thereupon he brings suit, &c.

[*Ante*, p. 221.]

*Notice of declaration.*

In the [&c.

Between, [&c.

Take notice, that a declaration against you, bearing date the —— day of —— instant, is filed at the master's office of the court of ——, at the suit of the above-named plaintiff, in an action [on promises] ; and unless you appear and plead thereto in [four, "*or*" eight] days from the date hereof, judgment will be signed against you by default.

Yours, &c. A. B.

Plaintiff's attorney (*or agent*).

To Mr. ——

The above-named defendant.

[*Ante*, p. 226.]

*Non pros for not declaring. (Queen's Bench.)*

In the Queen's Bench, the —— day of ——, in the —— year of the reign of Queen Victoria. Witness—Thomas Lord Denman.

Middlesex, to wit : Joseph Styles, according to the form of the statute in such case made and provided, was served with a copy of a certain writ of our Lady the Queen, called a writ of summons, issuing out of the court of our Lady the Queen, before the Queen herself "to answer John Nokes of a plea" [*&c. as in the writ, to the end of the cause of action :*] and the said Joseph Styles at the same day appeared by C. D. his attorney, at the suit of the said John Nokes ; and he, the said John Nokes, hath not declared in the said court of our Lady the Queen before the Queen herself, by his declaration in any

personal action or ejectment before the end of the term next following after such appearance, as aforesaid: therefore, it is considered, that the said John Nokes take nothing by his said writ, but that he be in mercy, &c.; and that the said Joseph Styles do go thereof without day, &c. And it is further considered by Her Majesty's court here that the said Joseph Styles do recover against the said John Nokes [£—], for his costs and charges by him about his defence in this behalf laid out and expended, by the court of our said Lady the Queen here adjudged to the said Joseph Styles, and with his assent, according to the form of the statute in such case made and provided; and that the said Joseph Styles have execution thereof, &c.

[*Ante*, p. 228.]

*The like in Common Pleas.*

In the Common Pleas.

The — day of —, in the — year of the reign of Queen Victoria.

Middlesex, to wit: John Nokes, who sued out a writ of our Lady the Queen, against Joseph Styles, late of — maltster, in an action [of —] doth not further prosecute his said writ. Therefore it is considered, that the said John Nokes take nothing by his said writ, but that he and his pledges to prosecute be in mercy, &c. And that the said Joseph Styles do go thereof without day, &c. And it is further considered by the justices here, that the said Joseph Styles do recover against the said John Nokes [£—], for his costs and charges by him about his defence in this behalf laid out and expended, by the justices here adjudged to the said Joseph Styles and with his assent, according to the form of the statute in such case made and provided; and that the said Joseph Styles have execution thereof, &c.

[*Ante*, p. 228.]

*Change of Venue.*

*Affidavit in ordinary cases.*

In the [&c.]

John Nokes, plaintiff,  
and

Joseph Styles, defendant.

Joseph Styles of —, maltster, the above-named defendant, maketh oath and saith, that the plaintiff's cause of action (if any) arose in the county of York, and not in the county of Middlesex, as laid in the declaration, or elsewhere out of the county of York.

Sworn, &c.

J. S.

[*Ante*, p. 230.]

*Particulars of demand.*

*With declaration.*

In the [&c.

Between, [&c.

This action is brought by the plaintiff as indorsee, against the defendant as drawer, of the bill of exchange for £—, in the first count of the declaration mentioned; and also to recover the sum of £— for the balance of an account due and owing to him from the defendant, for goods sold and delivered by the plaintiff to the defendant, and for work done by the plaintiff for the defendant, and for money paid by the plaintiff for the use of the defendant, between the years — and —: the full particulars of which cannot be comprised within three folios. Dated &c.

Yours, &c.

A. B., Plaintiff's attorney.

To Mr. C. D. the defendant,  
[or Defendant's attorney.]

[*Ante*, p. 251.]

*The like under a judge's order.*

In the [&c.

Between, [&c.

This action is brought to recover the balance of the following account: [*here set out the account, giving the defendant credit for such sums, &c. as are not disputed.*]

The above are the particulars of the plaintiff's demand in this action; and the said plaintiff intends at the trial to rely on all and every of the counts in the declaration in this cause, for the recovery of the same.

Yours, &c.

To Mr. C. D.,  
A. B., Plaintiff's attorney.

Defendant's attorney.

[*Ante*, p. 252.]

*Demand of Oyer.*

The defendant craves oyer and copy of the ["writing obligatory and of the condition thereof," or "indenture of lease," &c.] mentioned in the declaration in this cause: or, the plaintiff craves oyer and copy of the [indenture of lease, &c.] mentioned in the defendant's plea in this cause.

\*.\* *To be intituled in the court and cause.*

[*See ante*, p. 265.]

## PLEA.

## Commencement.

In the [&c.]

The — day of — A. D. 1843.

The said defendant by — his attorney, [or in person, &c.] says that, &c.

*General issues.] The general issue in assumpsit, after the commencement, as above-mentioned, is thus:—*says that he did not promise [or undertake or promise, according to the allegation in the declaration] in manner and form as the said plaintiff has above thereof complained against him; and of this he puts himself upon the country, &c.

*In debt on simple contract, thus:—*says that he never was indebted in manner and form as in the declaration alleged; and of this he puts himself upon the country, &c. R. Pl. 4 W. 4, II. s. 1.

*In debt on bond, &c. thus:—*says that the said writing obligatory [or indenture, or deed poll] is not his deed; and of this he puts himself upon the country, &c. *And the like in covenant.*

*In case or trover, thus:—*says that he is not guilty of the premises above laid to his charge, in manner and form as the said plaintiff has above thereof complained against him; and of this he puts himself upon the country, &c.

*In trespass, thus:—*says that he is not guilty of the said supposed trespass above laid to his charge, or any part thereof, in manner and form as the said plaintiff has above thereof complained against him; and of this he puts himself upon the country, &c.

*In ejectment thus:—*says he is not guilty of the said supposed trespass and ejectment above laid to his charge, or any part thereof, in manner and form as the said plaintiff has above thereof complained against him; and of this he puts himself upon the country, &c.

[*Ante*, p. 272.]

## Notice to plead.

The defendant is to plead hereto in four days [or eight days,] otherwise judgment.

[*Ante*, p. 223.]

## Demand of plea.

The plaintiff demands a plea in this cause.

\*.\* To be intitled in the court and cause.

[*Ante*, p. 282.]

*Judgment for want of plea.*

And the said Joseph Styles, in his proper person, comes into court here, and says nothing in bar or preclusion of the said action of the said John Nokes, whereby the said John Nokes remains therein undefended against the said Joseph Styles. Wherefore the said John Nokes ought to recover against the said Joseph Styles his damages on occasion of the premises. *Or in debt*, "Therefore it is considered that the said John Nokes do recover against the said Joseph Styles his said debt, and also £—— for his damages which he hath sustained, as well on occasion of the detaining the said debt, as for his costs and charges by him about this suit in this behalf expended, [by the court of our said Lady the Queen now here, *or in Common Pleas*, "by the justices here"] adjudged to the said John Nokes and with his assent; and the said Joseph Styles in mercy, &c. [*Ante*, p. 282.]

*Particulars of set off.*

In the [&c.]

Between, [&c.]

The following are the particulars of the defendant's set off in this action. [*Here copy the particulars of the set off, with the same certainty as is required in the particulars of demand.*]

Yours, &c.

To Mr. A. B.,

C. D., Defendant's attorney.

Plaintiff's attorney.

[*Ante*, p. 288.]

*Plea of payment of money into court.*

In the [&c.]

The —— day of —— A. D., 1843.

C. D. } The defendant, by —— his attorney [*or in person*,  
ats. } &c.] says [*or, in case it be pleaded to part only, add*  
A. B. } "*as to £——, being part of the sum in the declaration,*"  
*or, "as to the residue of the sum of £——"*] that the plaintiff ought not further to maintain his action; because the defendant now brings into court the sum of £——, ready to be paid to the plaintiff. And the defendant further says, that the plaintiff has not sustained damages [*or in actions of debt*, that he never was indebted to the plaintiff] to a greater amount than the said sum, &c., in respect of the cause of action in the declaration [*or in the introductory part of this plea*] mentioned; and this he is ready to verify: wherefore he prays judgment, if the plaintiff ought further to maintain his action thereof.

[*Ante*, p. 291.]

*Notice of trial by the record.*

In the [&c.]

Between, [&c.]

Take notice that the above-named plaintiff will on — in the court of Queen's Bench at Westminster, produce to the said court the record of the [recovery "or" recognizance] in his [declaration] in this cause mentioned. Dated &c.

A. B., Plaintiff's attorney [or agent.]

To Mr. C. D.,

Defendant's attorney [or agent.]

[See ante, p. 295.]

*Plea in abatement.**Affidavit verifying.*

In the ["Queen's Bench," "Common Pleas," or "Exchequer of Pleas."]

Between J. N., Plaintiff,  
and

J. S., Defendant.

J. S. of —, grocer, the defendant in this suit, maketh oath and saith that the plea hereunto annexed, is true in substance and matter of fact.

Sworn at, &c.

J. S.

[Ante, p. 296.]

*Notice of inquiry.*

In the [&c.]

Between, [&c.]

Take notice, that a writ of inquiry of damages will be executed in this cause on — the — day of — next, between the hours of eleven of the clock in the forenoon and one of the clock in the afternoon of the same day, at [the sheriff's office, Red Lion Square, near Holborn, in the county of Middlesex, or, "at the secondary's office, No. 28, Coleman-street, London," or if in the country, "at the house of J. C., commonly known by the name or sign of the — in the town of — in the county of —"]. Dated the — day of —, 1843.

To Mr. Joseph Styles,

The above-named defendant.

Yours, &c.

A. B., plaintiff's attorney,  
[or agent].

[Ante, p. 309.]

*Affidavit for rule, &c., to refer to the master.*

In the [&c.

Between, [&c.

J. R., clerk to C. D. of —, attorney for the above-named defendant, maketh oath and saith, that this action is an action of assumpsit brought upon a bill of exchange for one hundred pounds, drawn by the above named plaintiff upon, and accepted by the above named defendant, [*or as the case may be*], and this deponent further saith, that interlocutory judgment was signed in this cause, on — J. R.

Sworn, &c.

[*Ante*, p. 314.]

*Demand of replication, &c.*

In the [&c.

Between, [&c.

The [defendant] demands a replication, [*or plea to the new assignment, or rejoinder, &c.*] in this cause, by

Yours, &c., C. D.

To Mr. A. B. [Defendant's] attorney [*or agent.*]  
[Plaintiff's] attorney [*or agent.*] 27th July, 1843.

[*Ante*, p. 317.]

*Judgment of nonpros. (Queen's Bench.)*

*For not replying.*

And hereupon the said Joseph Styles prays that the said John Nokes may reply to the pleas of him the said Joseph Styles above pleaded; whereupon a day is given to the said John Nokes, before our said Lady the Queen, at Westminster, until —, that is to say, for the said John Nokes to reply to the pleas aforesaid; the same day is given to the said Joseph Styles at the same place. At which day, before our said Lady the Queen at Westminster, comes the said Joseph Styles by his attorney aforesaid; and the said John Nokes, although solemnly called, doth not come, nor hath he replied to the said pleas, nor doth he further prosecute his writ in this behalf against the said Joseph Styles, but therein makes default. Therefore it is considered that the said John Nokes take nothing by his said writ, but that he and his pledges to prosecute be in mercy, &c., and that the said Joseph Styles do go thereof without day, &c. And it is further considered by Her Majesty's court here that the said Joseph Styles do recover against the said John Nokes [twenty pounds four shillings] for his costs and charges by him about his defence in this behalf laid



out and expended, by the court of our said Lady the Queen here adjudged to the said Joseph Styles and with his assent, according to the form of the statute in such case made and provided; and that the said Joseph Styles have execution thereof, &c.

[*Ante*, p. 318.]

#### ISSUE.

In the Queen's Bench.

The [*date of declaration*] day of — A. D., 184—.

[*Venus*.] A. B. by E. F., his attorney, [*or in his own proper person; or by E. F., who is admitted by the court here to prosecute for the said A. B., who is an infant within the age of twenty-one years, as the next friend of the said A. B., as the case may be*] complains of C. D., who has been summoned to answer the said A. B., by virtue of a writ issued on [*date of first writ*] the — day of — in year of our Lord 18—, out of the court of our Lady the Queen, [*if in Queen's Bench, "before the Queen herself at Westminster," or if in Common Pleas, "before her justices at Westminster," or in the Exchequer, "before the barons of her Exchequer at Westminster," as the case may be*]; For that, [*copy the declaration from these words to the end, and the plea and subsequent pleadings to the joinder of issue.*] Thereupon the sheriff is commanded that he cause to come here, on the — day of —, twelve, &c., by whom, &c., and who neither, &c., to recognize, &c., because as well, &c.

[*Ante*, p. 324.]

*Issue, on a writ of trial.*

*Same as in ordinary cases to the joinder of issue inclusive, and then thus:*—And forasmuch as the sum sought to be recovered in this suit, and indorsed on the said writ of summons, does not exceed twenty pounds, hereupon on the [*date of the writ of trial*] day of — in the year —, pursuant to the statute in that case made and provided, the sheriff [*or the judge of — being a court of record for the recovery of debt in the said county, as the case may be*] is commanded that he summon twelve, &c., who neither, &c., who shall be sworn truly to try the issue above joined between the parties aforesaid, and that he proceed to try such issue accordingly; and when the same shall have been tried, that he make known to the court here what shall have been done by virtue of the writ of our Lady the Queen in that behalf directed, with the finding of the jury thereon indorsed, on the — day of —, &c.

[*Ante*, p. 382.]

## NOTICE OF TRIAL.

*The notice of trial in Middlesex, may be in this form:—*Take notice of trial in this cause for the [first] sittings within [or the sittings after] this present term to be holden in the court at Westminster in the county of Middlesex.

*For London, thus:—*Take notice of trial in this cause for the — sittings within [or for the sittings after, or for the adjournment day after] this present term, to be holden at the Guildhall of the city of London.

*For the assizes, thus:—*Take notice of trial in this cause, for the next assizes to be holden at [the Castle of York] in and for the county of [York].

[*Ante*, p. 331.]

## COGNOVIT.

*Form of a cognovit in debt.*

In the [&c.

Between, [&c.

I confess the debt in this cause to the amount of £—— [or if part only, then "I confess that I owe to the above-mentioned plaintiff £——, parcel of the debt by him in his declaration in this action demanded,"] and that the plaintiff hath sustained damages to the amount of one shilling on occasion of the detaining thereof, besides his costs and charges in this behalf, [to the amount of £—— or "to be taxed by the master,"] and in case I shall make default in the payment of the said [debt or "sum of £——,"] together with the said costs on the—— day of—— next, the plaintiff shall be at liberty to enter up judgment for the said [debt or "sum of £——,"] and costs, as aforesaid, and also the costs of entering up such judgment and of suing out execution thereupon; and shall be at liberty thereupon forthwith to sue out execution for the same, together with the amount of officer's fees, sheriff's poundage, costs of levying, and all other incidental expenses. And I do hereby [agree to withdraw the plea by me pleaded in this action, if the defendant have pleaded, "and] undertake not to bring any writ of error, or file any bill in equity, or do any other matter or thing whereby the plaintiff may be delayed in entering up his judgment and suing out execution upon default made as aforesaid. Dated, &c.

Witness, A. B.

J. S.

[*Ante*, p. 334.]

*Form in assumpsit.*

In the [&c.]

Between, [&c.]

I confess this action, and that the plaintiff hath sustained damages to the amount of £—— [*the damages laid, or the sum in the writ,*] besides his costs and charges in this behalf [to the amount of £——, or "to be taxed by the master,"] and in case I shall make default in the payment of the sum of £——, being the debt in this action, together with the said costs on, &c., as in the last form, to the end.

[*Ante*, p. 334.]

*Attestation of cognovit or warrant of attorney.*

"Signed, [sealed and delivered] by the above named A. B., in the presence of me, E. F., one of the attorneys of Her Majesty's court of —— at Westminster; and I hereby declare that I am attorney for the said A. B., and that I subscribe this attestation as such attorney."

[*Ante*, p. 338.]

*Warrant of attorney.*

Blank forms may be obtained at the stationers.

## JUDGMENT AS IN CASE OF NONSUIT.

*Affidavit.*

In the [&c.]

Between, [&c.]

J. R. clerk to C. D. of ——, gentleman, attorney for the above-named defendant, maketh oath and saith that issue was joined in this cause in —— term last, [and notice of trial given on the part of the above-named plaintiff for ——,] and that the said plaintiff hath not proceeded to the trial of this cause [in pursuance of his said notice.]

Sworn, &c.

J. R.

[*Ante*, p. 347.]

*Affidavit for the like after a peremptory undertaking.*

In the [&c.]

Between, [&c.]

J. R. clerk to C. D. of ——, gentleman, attorney for the

above-named defendant, maketh oath and saith that the above-named defendant, in — term last past, obtained a rule nisi of this honourable court, in this cause, for judgment as in case of a nonsuit, which was afterwards discharged by another rule of this honourable court, a copy of which is hereunto annexed, upon a peremptory undertaking of the above-named plaintiff to try this cause at [as in the rule.] And this deponent further saith, that the said plaintiff hath not since proceeded to the trial of this cause in pursuance of the said undertaking, [adding in C. B. a service of the notice of motion.]

[Ante, p. 356.]

COSTS OF THE DAY.

*Affidavit.*

In the [ &c.

Between, [ &c.

J. R. clerk to C. D. of —, gentleman, attorney for the above-named defendant, maketh oath and saith, that notice of trial in this cause was given on the part of the above-named plaintiff for £—, but that the plaintiff hath not proceeded to trial in pursuance of his said notice, nor hath he countermanded the same.

J. R.

Sworn, &c.

[Ante, p. 360.]

NISI PRIUS RECORD.

*Copy the issue, to the end of the award of the venire, (entering the declaration and other pleadings under the date of the day of the month and year when they were respectively pleaded, unless otherwise ordered by the court or a judge; R. G. H. 4 W. 4, r. 2, s. 1); then proceed as follows:*

"Afterwards, on the [teste of the distringas or habeas corpora] day of —, in the year —, the jury between the parties aforesaid is respited here until the [return day of the distringas or habeas corpora] day of —, unless — shall first come on the [first day of the sittings, or commission day of the assizes] day of —, at —, according to the form of the statute in such case made and provided, for default of the jurors, because none of them did appear. Therefore let the sheriff have the bodies of the said jurors accordingly."

[Ante, p. 362.]

*Writ of trial.*

"Victoria by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith. sheriff of our county —, [or, to the judge of — court of record for the recovery of debt in our county as the case may be:] Whereas, *John Nokes* in our court of our justices at Westminster, [or in *B. R.* before us at Westminster, or in the *Exchequer*, before the Barons of our *Exchequer* at Westminster, as the case may be,] on the [the day of the first writ of summons] day of — last, impleaded *John Styles*, in an action on promises, [or as the case may be,] "For that whereas, [reciting the declaration, as in a writ of inquiry,] and thereupon he brought suit.

"And whereas the defendant, on the — day of — by — his attorney, [or as the case may be] came into said court and said [here recite the pleas and pleadings to the joinder of issue,] and the plaintiff did the like. And whereas the sum sought to be recovered in the said action, and indorsed on the writ of summons therein, does not exceed 20*l.*, and it is fitting that the issue above joined should be tried before you the sheriff of — [or judge, as the case may be:] We therefore, pursuant to the statute in such case made and provided, command you, that you do summon twelve free and lawful men of your county, duly qualified according to law, who are in no wise akin to the plaintiff or to the defendant, who shall be sworn truly to try the said issue joined between the parties aforesaid, and that you proceed to try such issue accordingly; and when the same shall be tried in manner aforesaid, we command you that you make known [in *C. P.* to our justices at Westminster, or in *B. R.* to us at Westminster, or in the *Exchequer*, to the Barons of our said *Exchequer*, as the case may be,] what shall have been done by virtue of this writ, with the finding of the jury hereon indorsed, on the — day of — next. Witness Sir Nicholas Conyngham Tindal, Knight, at Westminster, the — day of — in the — year of our reign."

[*Ante*, p. 383.]

*Indorsement of verdict on writ of trial.*

"Afterwards on the [day of trial] day of — in the year — before me the sheriff of the county of — [or judge of the court of —] came, as well the within-named plaintiff, as the within-named defendant, by their respective attorneys within named, [or as the case may be,] and the jurors of the

me duly summoned as within commanded, also and being duly sworn to try the said issue within-  
*Writ of trial* ned, on their oath say that ——" R. G. H. 4 W. 4,

of God, of the sh. No. 6.

Queen, defendant?

or, to the job

every of taking *Form of indorsement, in case a nonsuit takes place.*

was, John Nokes

or, [or in R. & H. after the words "duly sworn to try the issue within men-  
*before the jury*," proceed as follows:]—"And were ready to give their

use may be, yet in that behalf, but the said John Nokes being solemnly

of ————, came not; nor did he further prosecute his said suit

was, [or as the case may be] the said Joseph Styles." R. G. H. 4 W. 4, r. 2, sch.

of the declaration.

nought suit.

[Ante, p. 386.]

or, on the ———

he case may be

the jury and

if said the sh.

*Judgment on same.*

the said action does not exist.

the [day of signing judgment] day of —— in the year ——

me the parties aforesaid by their respective attorneys afore-

id, [or as the case may be,] and the said sheriff [or judge, as

the case may be,] before whom the said issue came on to be

ed, hath sent hither the said last-mentioned writ, with

n indorsement thereon, which said indorsement is in these

words; to wit: [here copy the indorsement]. Therefore it is

considered" [ &c., in the same form as in ordinary cases.]

[Ante, p. 387.]

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*Notice to produce documents.*

In the [ &c.

Between, [ &c.

Take notice, that you are hereby required to produce to the court and jury, on the trial of this cause, [a certain deed, dated, " &c." and made between, " &c. describing the deed or other instrument, letters, papers, books, &c., that you desire the opposite party to produce in evidence"] and all other letters, books, papers and writings whatsoever, in anywise relating to the matters in question in this cause. Dated this —— day of —— 18 .

Yours, &c., C. D.

[Defendant's] attorney [or agent.]

To Mr. A. B. the above-named [plaintiff,]

or to Mr. E. F., his attorney [or agent.]

[Ante, p. 389.]

*Notice to admit documents.*

In the [&c.]

Between, [&c.]

Take notice, that the plaintiff [or defendant] in this cause, proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [or plaintiff] his attorney or agent, at —, on —, between the hours of —; and that the defendant [or plaintiff] will be required to admit that such of the said documents as are specified to be originals, were respectively written, signed or executed, as they purport respectively to have been; that such as are specified as copies, are true copies; and such documents as are stated to have been served, sent or delivered, were so served, sent or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in this cause. Dated [&c.]

G. H. attorney [or agent] for plaintiff.  
To E. F. attorney [or agent] for defendant.

Here describe the documents. *See ante*, p. 392.

*Affidavit for rule for a writ in the nature of a mandamus or commission to judges in India, to examine witnesses.*

In the King's Bench, or  
Common Pleas.

John Nokes, plaintiff,  
against

Joseph Styles, defendant.

John Nokes, of —, the above-named [plaintiff], maketh oath and saith, that this action, which is now pending in this honourable court, was commenced in — term last, for a cause of action which arose in the province of — in India. And this deponent further saith, that there are several persons now residing in the said province who are material and necessary witnesses for this deponent in the said cause, and that he is advised and verily believes that he cannot proceed with safety to the trial of the same, without the testimony of the said several witnesses.

J. N.

Sworn, &c.

[*See as to this affidavit, ante*, p. 398.]

*Mandamus.**To examine witnesses on interrogatories in India or the Colonies.*

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith, to

[*stating the names of the judges and style of the court*] at — in India, and to every of them, greeting: whereas one John Nokes hath heretofore commenced and prosecuted a certain action, for which cause hath arisen in India within the jurisdiction of your court, against one Joseph Styles, in our court (before us, *or, in C. B. of the Bench*) at Westminster, and which said action is yet there depending; and whereas upon the part of the said John Nokes we have been given to understand and be informed, that he is unable to proceed with safety to the trial of the said action, without the testimony of several persons now residing in India within the jurisdiction of your court, and he hath therefore besought us to award to him our writ in this behalf, directed to you the [chief justice, &c.] for the examination of witnesses in this behalf, according to the form of the statute in such case made and provided: we therefore, being willing that due and speedy justice be done in the premises, do command you that with all convenient speed you hold a court for the examination of witnesses in this cause, and do and perform all such other matters and things as by the directions of the said statute are required in this behalf. And in what manner you shall have executed this our writ, make known [to us, *or, in C. B., "to our justices"*] at Westminster, with all convenient speed, and at the same time return [to us, *or in C. B., to our said justices*] the examinations you shall have taken by virtue hereof, together with this writ. Witness, Thomas Lord Denman, [*or, in C. B., Sir Nicholas Conyngham Tindal, Knight,*] at Westminster, this — day of —, in the — year of our reign.

\*.\* *To be engrossed on parchment, and signed and sealed.*

[*Ante, p. 396.*]

#### *Commission.*

*To examine witnesses elsewhere abroad, or sick, &c.*

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith, to T. S., R. P., O. N., and M. L. greeting: whereas a certain issue is now depending in [our court before us, *or, in C. B., "in our court before our justices,"*] at Westminster, between John Nokes, plaintiff, and Joseph Styles, defendant, in a plea of [trespass on the case], and it hath been consented to by the said parties, that one E. G. a witness for the said [plaintiff] shall be examined upon interrogatories by and before certain commissioners to be appointed in that behalf: now know ye that we, in confidence of your prudence and fidelity, have appointed you, and by these presents do give unto you, any two or more of you full power and authority, diligently to examine



the said witness upon certain interrogatories to be exhibited to you by the parties aforesaid or one of them, in the plea aforesaid. We therefore command you, any two or more of you, that at a certain time and place, or times and places, to be by you appointed for that purpose, you, [*if the witness be abroad, say, "cause the said witness to come before you at —, and then and there,"*] examine him upon the interrogatories aforesaid, on his corporal oath first taken before you, any two or more of you, according to the form of oath hereupon first indorsed, and that you do take such his examination, and reduce it into writing on paper or parchment, and send the same on or before [*the return day*] "to our court before us" [*or, in C. B. "to our justices"*] at Westminster, closed up, under your seals, or the seals of any two or more of you distinctly and plainly set, together with the said interrogatories and this writ, there to be filed of record. And we further command you, and every of you, that, before you act in the execution of this commission, or be present at the swearing or examining of the said witness, you severally take the oath hereupon secondly indorsed; and we hereby give you, and one or more of you, full power and authority to administer such oath to the rest or any other of you. And we further command that all and every clerk or clerks to be employed in taking, writing, or transcribing the deposition or depositions aforesaid, of the said witness, shall, before he or they be permitted so to do, take the oath hereupon thirdly indorsed; and we hereby give you, any two or more of you, full power and authority jointly and severally to administer such oath to such clerk or clerks. And we further command, that previously to the execution of this commission, the time and place for executing the same shall be appointed and fixed by you, any two or more of you; and that you or any one or more of you shall thereupon cause a notice of such appointment to be duly served upon each and every of the others of you, and upon the attorneys or agents of the parties aforesaid respectively, personally, or by leaving the same for them respectively at their then respective places of abode, two days at the least before the execution hereof. Witness Thomas Lord Denman, [*or, in C. B. "Sir Nicholas Conyngham Tindal, Knight,"*] at Westminster, the — day of — in the — year of our reign.

*In what cases words of authority and not of command shall be inserted, see ante, p. 399.*

[See *ante*, p. 396.]

## APPENDIX II.

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The following questions of practice, will aid the younger members of the profession in detecting errors in the proceedings of their adversaries, and will at once indicate the mode of taking advantage of such errors.

### ARTICLED CLERKS.

- Is the service with a person who cannot by law take an articulated clerk?—Clerk not admitted. 41, 42.
- Are the articles not stamped before they are engrossed?—Clerk not admitted. 43.
- Is the affidavit of the execution of the articles filed with the proper officer within six months?—If not, clerk not admitted. 43.
- Are the articles enrolled within six months after execution?—If not, service to be deemed to commence only from time of enrolment. 44.
- Is the service for a less time than by law is required?—Clerk not admitted. 44.
- Is the affidavit of the execution of second articles filed within six months?—If not, clerk not admitted. 43.
- Has the master absconded or become insane?—Clerk discharged, and fresh articles to another. 46.
- Is the clerkship put an end to, before the regular period of its expiration?—Return of part of the premium. 47.
- Is there no certificate of fitness given by the examiners?—Clerk not admitted, unless upon application to the judges. 47—50. *Addenda*, p. 477.
- Has a term's notice not been given to the examiners?—Clerk not examined. 49.
- Have the articles not been lodged with the secretary of the Law Society, within the first seven days of the term in which the clerk is to be examined?—Clerk not examined, 50, unless the examiners dispense with it. *Id.*
- Have the answers of the clerk and his master, not been lodged with the secretary of the Law Society within the like time?—Clerk not examined, unless a judge order it, 46, or the examiners dispense with it. 50.
- Do the examiners refuse to examine, on account of any defect of service?—Application to the court. 50.

Have written notices of the clerk's intention to apply for admission, not been delivered to the master in time?—

Clerk not admitted, unless the court order it. 51, 52.

In Q. B., have the names, &c. of the clerk and his master, not been entered in the books of each of the judges in time?—Clerk not admitted, unless the court order it. 51, 52.

In C. P. or Ex., have copies of the notices not been affixed in the chambers of each of the judges in time?—Clerk not admitted, unless the court order it. 51, 52.

Is a copy of the notice not affixed in the Queen's Bench or Common Pleas offices?—Clerk not admitted. 51, 52.

Is there any mistake in any of the notices?—Clerk not admitted, unless the court allow it to be amended. 52.

Is the clerk not admitted in the second term after notices given?—The notices must be again given. 53.

Is the admission not enrolled?—Clerk not entitled to costs. Application to the court. 55.

Is the admission fraudulently obtained?—Party struck off the roll. 55.

#### ATTORNEY.

Is certificate not taken out or entered?—Penalty 50*l.*, if he practise, 56; and he cannot recover for business done during the time he was uncertificated. 58.

Is the certificate not taken out for a year?—Registrar will not certify for it, until the court shall order a certificate to be granted, 59; and the attorney shall not recover costs, 58, 78; but it shall not prejudice the client. *Id.* Apply for an order that the certificate be granted. 59.

Does an unqualified person act as an attorney?—Contempt of the court, and the party cannot sue for fees. 63.

Does an attorney act as agent for an unqualified person, or allow him to act in his name?—Attorney struck off the roll, and for ever disabled from practising, 63, 64; unqualified person committed, 65; client not bound to pay for the business done. 65, 78.

Does an attorney, prisoner, commence an action?—Contempt of the court. 65.

Does an attorney allow an attorney (prisoner) to commence an action in his name?—Contempt of the court. 65.

Is an attorney sued in other court than that of which he is an attorney?—Plea of privilege. 67.

Does the attorney, whose name is indorsed on the writ, refuse to state the profession and place of abode of the plaintiff, upon being ordered?—Attachment. 69.

Has there been a change of attorney, without a rule of court or judge's order?—Proceeding by the new attorney bad. 70, 71.

Has notice of the change not been given to the opposite attorney?—The proceeding bad, if objected to in the first instance. 71.

Upon the death of an attorney in a suit, is any further proceeding taken by another attorney, without notice of the death, &c. to the opposite party?—The proceeding bad. 71.

Does an attorney refuse to perform an undertaking?—Attachment. 72.

Before an action brought by an attorney for costs, has a bill not been sent or delivered to the client one calendar month? 73, 74.—Plea in bar to the action. 77, 78.

Does an attorney refuse to deliver papers, deeds, &c. to his client, on being satisfied any lien he may have upon them?—The court or a judge will order them to be delivered up. 79, 80.

Do the plaintiff and defendant settle the action by collusion, to defraud the attorney of his costs?—The court will order the parties colluding to pay the attorney. 82.

After an attorney's bill referred for taxation, does the client refuse to pay?—Order for judgment, if the retainer be not disputed, 88, 89; or rule and execution. 89.

If upon taxation, a sixth be taken off?—The attorney shall pay the costs of taxation. 89.

Is an attorney guilty of an indictable offence, with reference to his profession?—Struck off the roll; but the court will not order him to answer the matters of the affidavits. 92, 96a.

Has an attorney, convicted of forgery, perjury, subornation of perjury or barratry, afterwards practised?—Transportation for seven years. 92, 96a.

Is an attorney guilty of culpable malfeasance?—Struck off the roll; or attachment; or ordered to pay costs. 93, &c. 96a.

Is the client damnified by the gross ignorance or negligence of the attorney?—Action against the attorney; defence to action on his bill; or attorney ordered to pay costs. 94, 95, 96a.

Is an attorney guilty of culpable nonfeasance in his character as attorney?—Usually ordered to do the thing omitted, and pay costs. 96, &c. 96a.

#### **LIMITATION OF ACTION.**

Is the action brought after the time limited in that behalf has expired?—Plea of the statute of limitations. 97, 99.

Is the time limited for bringing an action about to expire?—Sue out process, and return and enter it on record. 98, 99.

#### WRIT OF SUMMONS.

Does the copy served omit any part of the regular form as given by the statute?—Move to set aside the service for irregularity. 101.

Does the direction of the copy of the writ state the defendant's residence with sufficient certainty?—If not, service irregular. 101, 102.

Is the name of the plaintiff or defendant incorrectly stated?—Compel the plaintiff by judge's order, to amend and pay costs. 102.

Is the defendant described by an initial letter or contraction of his christian or first name?—Compel the plaintiff by judge's order to amend and pay costs, unless the action be on a bill, note or other written instrument in which he is so described. 102.

Does the writ bear date on the day it was issued?—If not, irregularity. 102.

Does the writ describe the form of action incorrectly?—Irregularity. 103.

Are the name and address of the attorney properly indorsed on the writ?—If not, irregularity. 103, 104, 109.

Is the indorsement of the debt (when necessary) not properly made on the writ?—Irregularity. 105, 109.

Has the writ been altered by the attorney, without being resealed?—Writ void. 106, 110.

Is the writ served more than 200 yards beyond the border of the county?—Service irregular. 106, 107.

Is it served otherwise than personally?—Service irregular. 106.

Does the person who serves it, refuse to shew the original, when demanded?—Service irregular. 106.

Is the writ served on a Sunday, or more than four months from its teste?—Service void. 108.

Does the person, who serves it, indorse on it the time of service?—If not, plaintiff cannot enter an appearance for defendant. 108.

Is the motion to set aside the service made within the time limited for the appearance?—If not, rule discharged. 109.

#### DISTRINGAS.

Does the defendant keep out of the way, to avoid service of the writ?—Distringas. 110.

Is the copy left, tested and dated?—If not, irregularity. 113, 114.

Is the copy left, properly indorsed?—If not, irregularity. 113.

Is there any material variance between the *distringas* and writ of summons, in the name of defendant, &c.?—Irregularity. 114.

#### PEARANCE.

Does the plaintiff, in Q. B. or C. P., enter an appearance for the defendant in the term next following the service of the writ?—If not, appearance afterwards by plaintiff irregular, 118.

#### OUTLAWRY.

Is the writ of summons returned within less than fifteen days from the delivery of it to the sheriff?—*Distringas* upon it irregular. 119, 120.

Is there any irregularity in the *distringas* or its indorsements?—Subsequent outlawry irregular. 120.

Is the writ of exigent or writ of proclamation made returnable on a day certain in term?—If not, irregularity. 120.

Is the writ of exigent or proclamations tested on the day of the return of the *distringas*?—If not, irregularity. 120, 121.

Is every subsequent writ tested on the day of the return of that next preceding?—If not, irregularity. 121.

Is there not a month between the third proclamation and the *quinto exactus*?—Outlawry void. 121, 122.

Are any of the proceedings erroneous?—Move to set aside the outlawry. 123. Writ of error. 124.

#### CAPIAS.

Is the party arrested for a cause of action, for which formerly he could not be holden to bail?—Move to discharge him out of custody, or that the bail bond be delivered up to be cancelled. 125, &c.

Is the affidavit on which the *capias* was obtained, defective, or false, or can it be satisfactorily explained or answered?—Move to discharge the defendant, &c. 125, &c., 149, 160, 161.

Is the affidavit, if made after the commencement of the action, intitled in the cause?—If not, move to discharge the defendant, &c., 141.

Is the affidavit, if made before the commencement of the action, intitled in the cause?—Move to discharge the defendant, &c. 141.

Does the affidavit state the deponent's addition?—If not, move to discharge the defendant, &c. 141.

Is the defendant described in the *capias* or affidavit by initials or a wrong name?—Move to discharge him, or

that the bail bond be delivered up to be cancelled, unless the action be upon a bill, note or other written instrument, so describing him, or unless it appear that due diligence has been used to ascertain his right name. 142, 143, 154.

Does the affidavit show a good cause of action?—If not, move to discharge the defendant, &c. 143.

Does the affidavit show that the debt is then due and unpaid?—If not, move to discharge the defendant. 144.

Does the affidavit state the cause of action with sufficient particularity?—If not, move to discharge the defendant. 144.

Does not the affidavit state the cause of action positively, or but merely by way of argument?—Move to discharge the defendant. 145.

Is the jurat of the affidavit insufficient?—Move to discharge the defendant. 147.

Is the judge's order made before the affidavit is completed?—Order and *capias* irregular. 147.

Does the *capias* bear date on the day it is issued?—If not, irregularity. 153.

Does the *capias* vary from the affidavit in the names or numbers of the parties?—Move to discharge the defendant, &c. 153.

Does the *capias* incorrectly state, or vary from the affidavit, in stating the cause of action?—Move to discharge the defendant, &c. 155.

Is the writ properly indorsed?—If not, move to discharge the defendant, &c. 156.

Is there any mistake or omission in the copy served, or in the endorsement thereon?—Irregularity, *qu.* 158, 160.

Does the sheriff's officer demand or take more than the legal fee, for executing the writ?—Contempt, attachment. 159.

Is the arrest made more than a calendar month from the date of the *capias*?—Move to discharge the defendant, &c. 161, 162, 163. Action.

Is the arrest made out of the bailiwick of the sheriff, not being upon the borders?—Move to discharge the defendant, &c., 163. Action.

Is the arrest made on a Sunday?—Move to discharge the defendant. 163. Action.

Is the arrest made, whilst the defendant is privileged?—Move to discharge him. 163, &c., 167.

#### **BAIL BOND.**

Does the sheriff discharge the defendant without a bail bond or deposit?—Escape, if bail be not put in and perfected in time. 168.

- Is bail put in on or before the eighth day after the arrest?  
—If not, bail bond forfeited. 170.
- Is bail perfected in due time after exception?—If not,  
bail bond forfeited. 170.
- Does the writ in an action on the bail bond bear date  
before the bail bond was forfeited?—Irregularity. 103.
- Is more than one action brought on the bail bond,  
without sufficient cause?—Proceedings stayed on pay-  
ment of the costs of one action. 173.
- Is the affidavit, upon motion to set aside proceedings on  
bail bond, in the form prescribed by the rule of court?  
If not, rule discharged. 173.

**DEPOSIT WITH THE SHERIFF.**

- Is bail put in and perfected in due time?—If not, the  
money deposited is to be paid over to the plaintiff. 175.

**RULES UPON THE SHERIFF.**

- Is a writ executed by a special bailiff?—Sheriff cannot be  
ruled to return the writ or bring in the body; 29; nor  
is he liable for any thing which may occur in the exe-  
cution of it. 22, 29, 33.
- Does a sheriff fail to return a writ of mesne process?—  
Attachment. 29, 31.
- Is the sheriff ruled to return a writ, after six lunar  
months from the expiration of his office?—Irregula-  
rity. 29.
- Is the sheriff ruled to return a writ, where he ought not?  
—Set aside the attachment. 29.
- Is the rule against the present sheriff, instead of the late  
sheriff?—Set aside the attachment. 29, 38.
- Is an order to return a writ disobeyed?—Make the order  
a rule of court, and move for an attachment. 29, 30,  
34.
- Is the sheriff's return to a writ bad?—Attachment. 30,  
31, 36.
- Is a sheriff's return false?—Action. 31.
- Is the rule to bring in the body obtained after bail put in,  
and before exception?—Irregularity. 31.
- Is the rule to bring in the body sued out, when it ought  
not?—Irregularity. 31.
- Is the rule to bring in the body not sued out within a  
reasonable time?—Rule, or attachment set aside. 32.
- Is an order to bring in the body disobeyed?—Make the  
order a rule of court, and move for an attachment. 32,  
36.
- Is a rule to return a writ of execution disobeyed?—At-  
tachment. 36.
- Is the sheriff ruled to return a writ of execution, after six



- months from the expiration of his office?—Rule or attachment set aside. 33.
- Is a rule to return a writ of execution sued out, where it ought not?—Rule or attachment set aside. 33.
- Is an order to return a writ of execution or *condemni expensas* disobeyed?—Make the order a rule of court, and move for an attachment. 34.
- Is the rule to bring in the body sued out, before the time for putting in bail has expired?—Irregularity, 176. Set aside attachment. 38.
- Has there been delay in suing out and prosecuting the body rule?—Rule or attachment set aside. 35, 38.
- Is the rule of allowance not served before the expiration of the rule to bring in the body?—Attachment. 35.
- Is the attachment moved for after bail justified, and rule of allowance served?—Irregularity. 35.
- Is notice of exception given, where no exception entered? Irregularity. 184. Attachment set aside. 38.
- Is notice of exception not in writing?—A nullity, unless waived. 184. Attachment set aside. 38.
- Is notice of exception not intitled in the cause?—A nullity, unless waived. 185. Attachment set aside. 38.
- Is motion to set aside a regular attachment made before bail justified, and rule of allowance served?—Rule discharged. 39.
- Is defendant (when hoken to bail) discharged without taking a bail bond?—Attachment not set aside. 39.
- Is defendant discharged upon giving a bail bond executed by one surety only?—Attachment for not bringing in the body not set aside at the instance of sheriff or his officer. 39.
- Is the affidavit to set aside a regular attachment, at the instance of the sheriff or his officer, not in the form required by rule of court?—Rule discharged. 39.
- Is a rule to set aside a regular attachment, at the instance of the defendant, obtained without an affidavit of merits?—Rule discharged. 39.
- Is the affidavit not properly intitled.—Rule discharged. 40.

#### SPECIAL BAIL.

- Is bail put in on or before the 8th day inclusive after the arrest?—If not, plaintiff may proceed against the sheriff or on the bail bond. 176.
- In cases of country bail, is the bail-piece transmitted, and notice of bail given before such 8th day?—If not, plaintiff may proceed against the sheriff or on the bail bond. 176, 195.
- Are more than two put in as bail, without leave of a judge?—Irregularity. 177.

- Is an attorney or his clerk put in as bail?—Bail a nullity. 177.
- Is a sheriff's officer or other person who cannot be bail, put in as such?—Except to him. 184.
- Are either of the bail, put in, not a housekeeper or freeholder in England?—Bail rejected. 177.
- Is the county in the margin of the bail piece, that in which the defendant was arrested?—If not, bail rejected. Irregularity. 178.
- Is not the bail piece intituled in the court, or does it state the names of the parties incorrectly?—Bail a nullity. 178.

**NOTICE OF BAIL.**

- Is no notice of bail given?—Bail a nullity. 178.
- Is there any omission or defect in it?—Bail rejected. 183.
- Is it correctly intituled in the court and cause?—If not, bail rejected. 178.
- Does it correctly state the names and additions of the bail?—If not, bail rejected. 179.
- Does it describe sufficiently where they reside, and have resided within the previous six months?—If not, bail rejected. 179, 180.
- If accompanied by affidavit of sufficiency, does such affidavit describe their property with sufficient certainty?—Plaintiff not liable to costs, if they justify. 181, 182.
- Is such affidavit otherwise defective?—Plaintiff not liable to costs if the bail justify. 182.

**EXCEPTION AND NOTICE.**

- Is there no exception, or no notice of it, or no notice in writing, or notice wrongly intituled?—Bail deemed perfected in twenty days, although they do not justify, 184. Proceedings against the sheriff, or on the bail bond set aside. 184, 185.

**ADDING BAIL.**

- Are bail added without the leave of a judge?—Rejected. 186.

**JUSTIFICATION.**

- Is notice given for justifying within four days after notice of exception?—If not, plaintiff may proceed upon the bail bond, or against the sheriff, if the body rule have expired. 186.
- Is the notice in C. P. or Ex., a two days' notice?—If not, bail rejected. 187.
- Has the notice been served before eleven o'clock?—If not, bail rejected. 188.
- Is the notice correctly intituled in the court and cause?—If not, bail rejected. 188.

Does the notice state the names of the bail incorrectly?—

Bail rejected. 188.

Is notice of justification given by a different attorney from the one who put in the bail, without an order to change the attorney?—Bail rejected. 188.

Are the bail objectionable on any of the grounds stated in page 189?—Bail rejected. 189.

If further time to justify be given, is the notice thereof served before three o'clock?—If not, bail rejected. 192.

Is no rule of allowance served?—Proceed as if the bail had not justified. 192.

Have the bail sworn falsely, with the privity of the defendant?—Rule of allowance set aside. 193.

Have the bail been before rejected for insufficiency?—Rule of allowance set aside. 193.

Is the defendant rendered, pending a rule to set aside a rule of allowance?—Plaintiff may notwithstanding proceed against the sheriff, or on the bail bond. 193.

#### PROCEEDINGS AGAINST BAIL.

Has a *ca. sa.* been sued out against the principal?—If not, proceedings against the bail irregular; 202; or they may plead it, 202.

Is the *ca. sa.* directed to the sheriff of the county in which the venue was laid?—If not, irregularity. 203.

Has the *ca. sa.* lain in the sheriff's office four *clear* days before it was returnable?—If not, irregularity. 203.

Is the *ca. sa.* returned *non est inventus*, whilst the defendant is in the sheriff's custody?—Move to quash the return. 203.

Is the *scire facias* issued from the court in which the original action was brought?—If not, irregularity. 204.

Is it directed to the sheriff of Middlesex?—If not, irregularity. 204.

Is it tested and returnable in term time?—If not, irregularity, 204.

Are there fifteen days between the teste and return, or between the teste of the first writ and the return of the second?—If not, irregularity. 204.

Has the *sci. fa.* been lodged in the sheriff's office four *clear* days before the return day?—If not, irregularity. 204.

Has the plaintiff recovered for a different cause of action from that in his affidavit for the *capias*?—Bail discharged. 206.

Has the plaintiff given time to the principal, by *cognovit* or otherwise?—Bail discharged. 207.

#### RENDER.

Is the render before the expiration of the body rule?—If not, sheriff not discharged. 209.

Is the render pending a rule to set aside the rule of allowance?—Plaintiff may proceed against the sheriff or on the bail bond, as if such render had not been made. 209, 210.

If the bail to the action be sued in debt,—is the render within fourteen days after the service of process?—If not, it is a nullity. 210.

If they be sued by *sci. fa.*,—is the render before the return day, where the bail are summoned, or before eight days after the return day if the bail be not summoned?—If not, it is a nullity. 210.

Is notice of render not given?—Render not complete, and plaintiff may proceed as if there were no render. 213.

#### REMOVAL OF CAUSES BY CERTIORARI.

Is the cause removed, where it ought not?—*Procedendo*. 218.

Does the defendant fail to enter an appearance in the court above?—*Procedendo*. 219.

Does the plaintiff fail to declare within a year, or when ruled to declare?—Defendant may refuse to receive declaration afterwards. 219.

#### DECLARATION.

Is the declaration intituled of the proper court?—If not, irregularity. 221.

Is it intituled of the day on which it is filed or delivered? If not, irregularity. 221.

Is the venue, in local actions, in a wrong county?—Nonsuit. 221.

Does it correspond with the writ in the number of the plaintiffs?—If not, irregularity. 221.

Is it against more defendants than are included in the writ?—Irregularity. 221, 102.

Does it correspond with the writ as to the cause of action?—If not, irregularity. 222, 103.

Is special venue stated in the body of it?—A judge at chambers may order the plaintiff to strike it out, and pay costs. 223.

Does it contain two or more counts for the same matter of complaint?—Apply to a judge to strike out the extra counts. 223.

If such counts be retained by order of a judge, does the plaintiff, at the trial, fail in proving a distinct cause of action on each count?—Verdict against him on those counts, and costs. 224.

Is the declaration delivered or filed between the 10th August and 24th October?—A nullity. 3, 224.

- Is it delivered or filed within a year from the service of the writ?—If not, irregularity. 224.
- Does the plaintiff fail to declare in four days after declaration demanded?—Nonpros. 225, 228.
- Is the declaration delivered on the day it bears date?—If not, irregularity. 226.
- Does the notice of declaration state the nature of the action?—If not, irregularity. 226.
- Does the notice vary from the writ in the cause of action?—Notice and declaration irregular. 226.
- Is the notice served personally or at the defendant's place of residence?—If not, irregularity. 226.
- Is it served on a Sunday?—Nullity. 227.
- Is the declaration or notice in *indebitatus assumpsit* or debt on simple contract, delivered without particulars of demand?—Plaintiff not entitled to costs of full particulars, if afterwards ordered. 227.

#### CHANGE OF VENUE.

- Is a rule to change the venue obtained on the usual affidavit, in a case where it ought not?—Move to discharge it. 232, 230.
- If venue be brought back, on undertaking to give material evidence in the county,—does the plaintiff at the trial fail to give such evidence?—Nonsuit. 233.
- Is an application to change the venue on special grounds, made before issue joined?—Rule discharged. 236.
- Is an application to change the venue in local actions, made before issue joined?—Rule discharged. 237.

#### CONSOLIDATING ACTIONS.

- Are several actions brought on the same policy of insurance?—Move to consolidate. 237.
- Are two or more actions brought for causes that might be made the subject of one?—Move to consolidate. 238, 239.

#### PARTICULARS OF DEMAND, &c.

- In *indebitatus assumpsit* or debt on simple contract, is the declaration or notice delivered without particulars?—Plaintiff not entitled to costs of full particulars, if afterwards ordered. 251.
- Is a copy of the particulars of demand, annexed to the record?—If not, the judge's marshal may refuse to receive it. 252.
- Is a copy of the particulars of set off (if any) annexed to the record?—If not, plaintiff must prove them, if he seek to derive any advantage from them. 252.
- Are particulars of demand ordered and not delivered?—Proceedings stayed until they are delivered. 253.

Are the particulars delivered not sufficiently certain or explicit?—Obtain an order for further and better particulars. 254.

**OYER.**

Is oyer demanded after the time limited for that purpose?—Refuse to grant it. 265.

Is oyer refused by a plaintiff, when legally demanded?—Error. 266.

Is oyer refused by a defendant, when legally demanded?—His plea, &c., may be treated as a nullity. 266.

**INTERPLEADER in ordinary cases.**

Is the application made in an action not within the statute?—Rule discharged. 268.

Is the application made, when there is no action pending? Rule discharged. 269.

Has the applicant been indemnified?—Rule discharged. 270.

Is the application made to the court in which the action is pending?—If not, rule discharged. 270.

In C. P. or Ex., has previous notice of motion been given to the opposite parties?—If not, rule not to be a stay of proceedings. 270.

**PLEA.**

Is the plea intituled of the day of the month and year when pleaded?—If not, irregularity. 271, 275.

Is a plea of judgment recovered pleaded, without the date of the judgment and number of the roll in the margin?—Sign judgment. 273.

Is a sham plea palpably fictitious upon the face of it? or is it absurd as well as false? or does it comprise several defences, some of law, others of fact? or raise difficult questions of law? or tender issues wholly immaterial?—Apply for leave to sign judgment. 273, 274.

Is the plea wholly inapplicable to the action, as non assumpsit in debt, or the like?—Sign judgment. 274.

Is a plea otherwise a nullity?—Sign judgment. 304.

Is a plea delivered between the 10th August and 24th October?—Sign judgment. 274, 284.

Is a plea concluding with a verification, not signed by counsel?—Sign judgment. 275, 283.

Is a plea pleaded before appearance or declaration?—Sign judgment. 275.

Is a plea not only bad, but frivolous?—Apply for leave to sign judgment. 275.

Is the plea pleaded within the four or eight days limited

for that purpose, a rule to plead being entered and a plea demanded (when necessary)?—If not, sign judgment. 275, 276, 304.

After time to plead on the usual terms, is the plea pleaded an issuable plea?—If not, sign judgment. 279, 280.

Is judgment signed for want of a plea, where no notice to plead has been given? 280; or where no rule to plead has been entered? 281; or where a demand of plea (when necessary) has not been given? 281.—Irregularity.

Does the defendant plead before he takes the declaration out of the office?—Sign judgment. 283.

Are two pleas pleaded, comprising the same defence?—Apply to a judge to strike out one. 284.

Is the general issue "by statute," and special pleas pleaded?—Apply to a judge to strike out the special pleas. 284.

Are two or more pleas pleaded, without a rule for that purpose?—Sign judgment. 284.

Is a plea of tender pleaded, without paying the money, into court?—Sign judgment. 290, 294.

Is a plea in abatement or to the jurisdiction pleaded more than four days after declaration delivered, or filed, and notice given?—Plea a nullity. 297.

Is it pleaded before appearance?—Plea a nullity. 297.

Is it pleaded without an affidavit of verification?—Plea a nullity. 298.

Is a plea *puis darrein continuance* pleaded without an affidavit that the matter of it arose within eight days before, or without an affidavit of verification?—Plea a nullity. 303.

Is judgment for want of a plea signed, without appearance entered?—Irregularity. 305.

#### WRIT OF INQUIRY.

In town cases, is eight days notice of inquiry given, where the defendant resides more than forty miles from London?—Return the notice, with the reason thereof. 310.

#### REPLICATION, &c.

Does the plaintiff reply, or surrejoin, &c., within four days after the service of the rule for that purpose?—If not, sign judgment of nonpros. 316, 318.

Does the defendant rejoin or rebut, &c., within four days after service of the rule for that purpose?—If not, strike out the previous pleadings, and sign judgment as for want of a plea. 316, 319.

**DEMURRER.**

- Is a demurrer delivered, without any cause of demurrer in the margin, or with a frivolous one?—Irregularity. Move for leave to sign judgment. 319.
- Is joinder in demurrer delivered within four days after demand?—If not, sign judgment. 320.
- Does the party demurring add the joinder?—Irregularity. 320.
- Has either party not delivered his paper books four clear days before the day appointed for argument?—Deliver copies for him on the following day, and he shall not be heard until he has paid you for them. 322.

**ISSUE.**

- Is there a variance between the issue and the pleadings, or *nisi prius* record?—Obtain an order to have it amended. 325, 326. In some cases, new trial. 326.
- Does the issue on a writ of trial conclude with an award of a venire?—Irregularity. 327.
- Is there a material variance between the issue and writ of trial?—Irregularity. 327.

**NOTICE OF TRIAL.**

- Is the cause tried without giving notice of trial?—Verdict set aside for irregularity. 329.
- Is the notice insufficient?—Irregularity. But waived by attending at the trial and defending. 330.
- Are two different notices given?—Irregularity. 331.
- Is notice by continuance given after a bad first notice?—Notice of continuance bad also, unless it can be deemed a new notice of trial. 331.
- Is notice by continuance given a second time?—Irregularity. 331.

**COGNOVIT OR WARRANT OF ATTORNEY.**

- Is it witnessed by the defendant's attorney, according to the required form?—If not, set it aside. 336.
- Is it or a copy filed within twenty-one days?—If not, void as against assignees. 338.
- Is judgment on a warrant of attorney signed according to the terms of the warrant and defeazance?—If not, irregularity. 340, 343.
- Has a cognovit been obtained by fraud, or from an infant?—Cancelled. 344.
- Has a cognovit been obtained from one of two partners, without the knowledge of the other?—Cancelled. 344.
- Has a warrant of attorney been obtained by fraud?—Cancelled. 345.



Has a warrant of attorney been given, to defraud creditors?—Cancelled. 345.

Has a warrant of attorney been given for an immoral consideration?—Cancelled. 346.

Has a warrant of attorney been given for a gaming debt?—Cancelled. 346.

Has a warrant of attorney been given by a feme covert or infant?—Cancelled. 346.

Is a warrant of attorney expressly a charge upon an ecclesiastical living?—Cancelled. 346.

#### JUDGMENT *as in case of* NONSUIT.

In town causes, has the plaintiff proceeded to trial in the term after that in or of which issue was joined?—If not, judgment as in case of nonsuit in the third term. 349, 350.

In country causes, where issue is joined in a *non-issuable* term, has the plaintiff proceeded to trial at the next assizes?—If not, judgment as in case of nonsuit in the term after. 351.

In country causes, where issue has been joined in an *issuable term*, has the plaintiff proceeded to trial at the second assizes after?—If not, judgment as in case of nonsuit in the term after. 350, 351.

In either case, if notice of trial have been given, has the plaintiff proceeded to trial in pursuance of the notice?—If not, judgment as in case of nonsuit in the term after. 350, 351.

Has plaintiff failed to proceed to trial in pursuance of peremptory undertaking?—Judgment as in case of nonsuit in the term after. 356.

#### COSTS OF THE DAY.

Has the plaintiff failed to proceed to trial in pursuance of notice, and has not countermanded his notice in time?—Costs of the day. 359.

Are costs of the day moved for before moving for judgment as in case of nonsuit?—No judgment as in case of nonsuit after. 360.

#### SPECIAL JURY.

In Middlesex or London, is the rule for a special jury served, and the cause marked in the marshal's list, the day before the adjournment day?—If not, rule a nullity. 366.

Is not the rule served in time to enable the opposite party to have the jury struck before the day of trial?—Cause may be tried by a common jury. 366.

Is there much delay in serving the rule?—Move to discharge it. 366.

Does the attorney for either party fail to attend before the master to strike the jury?—Proceed *ex parte*. 366.

Does a defendant, after obtaining and serving a rule for a special jury, take no further steps in it?—Cause may be tried by a common jury. 366, 367.

Does it appear clearly that the rule for a special jury has been obtained for delay?—Move that the cause be tried in term or on some particular day. 367.

#### JURY.

Is there want of qualification in any of the jurors?—Challenge. 369.

Does any one appear on the jury whose name is not in the panel?—Challenge. 374.

#### TRIAL BEFORE THE SHERIFF.

Has a cause, not within the statute, been tried upon a writ of trial?—Irregularity. Verdict or nonsuit set aside. 381.

Does the issue conclude with an award of venire?—Irregularity. 383.

Is there any other mistake in the issue?—Return it. 383.

Does the plaintiff's attorney amend the writ, without leave?—Verdict for plaintiff set aside. 383.

Does the writ misstate the day of the teste of the writ of summons?—Verdict for plaintiff set aside. 384.

Does the writ omit to state the amount of the debt?—Arrest of judgment. 385.

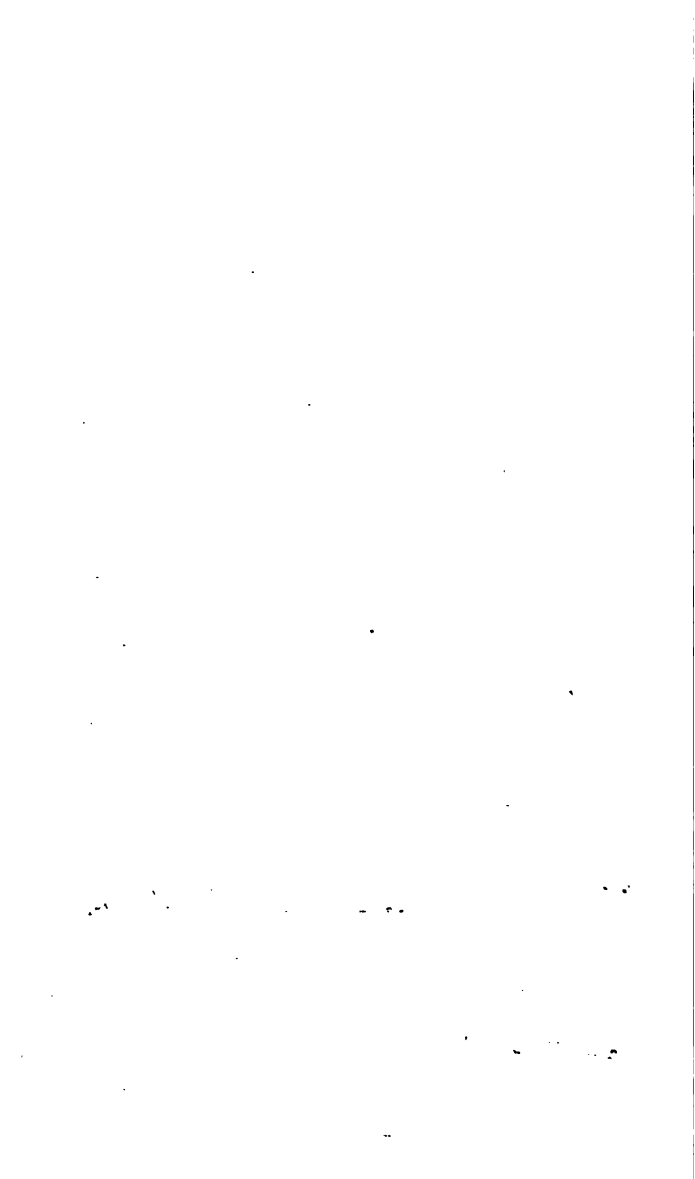
Is the trial had after the return day of the writ?—Mistrial. Verdict set aside. 385.

#### WITNESS.

Is not the witness served with subpoena personally?—No attachment or action. 393, 395, 396.

Is not the witness served before the time mentioned in the subpoena for his attendance?—No attachment. 393.

Are not the travelling expenses paid or tendered to country witnesses?—No attachment or action. 394, 395.



# ADDENDA

*To the 1st Vol.*

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\*.° The reader is requested to make, in the margins of his copy, the necessary references to these Addenda.

10. *Officers of the court.*] By stat. 5 and 6 Vict. c. 22, the Fleet and Marshalsea prisons are abolished, and the Queen's Bench prison, hereafter to be called the Queen's prison, for which a keeper is appointed instead of the former marshal, is hereafter to be the prison of the courts of Queen's Bench, Common Pleas, Exchequer, and Marshalsea court.
23. *Sheriffs.*] Upon an *Elegit*, where lands are extended, the poundage is calculated on the annual value of the lands, and not on the sum indorsed on the writ. *Nash et al. v. Allen*, 12 *Law J.*, 298, *qb.*
23. A sheriff is not liable to an action for treble damages, under stat. 28 El. c. 4, for taking greater fees than are allowed by a subsequent statute, for instance, by stat. 1 Vict. c. 55, s. 2. *Semb. per Patteson, J. Usher v. Walters*, 12 *Law J.*, 246, *qb.*
23. A sheriff who has seized goods under a *fi. fa.*, and sold them under *appraisement*, is not entitled to deduct the expenses of sale from the proceeds; the table of fees framed under stat. 1 Vict. c. 55, applying to sales by

auCTION only. *Phillips v. Viscount Canterbury*, 12 *Law J.*, 401, *ex.*

23. The stat. 1 Vict. c. 55, s. 4, which enables the court to make the sheriff pay the costs of any complaint against him for taking greater fees than are allowed by law, does not enable them to order him to pay the costs of taxation, where they are taxed by the master under a judge's order by consent. *Curlewis v. Bird*, 1 *Dowl. N. C.* 752.
45. *Attornies.*] Where an attorned clerk, in ill health, was advised by his medical attendants to go abroad, and had his master's consent to do so; and he accordingly went to the United States of America, where he diligently applied himself to the study of law, and was absent altogether seven months; Williams, J. is reported to have allowed him to be admitted at the expiration of five years (including these seven months) from the date of his attornment. *Ex p. Cross*, 2 *Dowl. N. C.* 692.
105. *Writ of Summons.*] Where after the debt and costs indorsed upon a writ of summons were paid within the four days, and the defendant then had the costs taxed, the court held that the master might allow for two attendances to serve the writ, and but two only, although there were more. *Tapping v. Greenway*, 1 *Dowl. N. C.* 408.
106. Where the copy of the writ served, omitted the memorandum at foot—"N.B. this writ is to be served within four calendar months," the court set aside the service for irregularity. *Day v. Holly*, 12 *Law J.*, 295, *qb.* 2 *Dowl. N. C.* 974.
106. It is now fully agreed by the judges of all the courts, that the service of the writ of summons shall be strictly personal, and that no other mode of service shall be deemed equivalent to it. *MS. Ex. M.* 1843.
107. Where an application is made to set aside the service of a writ of summons, because it was not served in the county or within 200 yards of the border, the affidavit must state the fact expressly; it is not sufficient for the deponent to say that he is "informed and verily believes" that the place where it was served is not within the county, or within 200 yards of the border thereof. *Harrison et al. v. Wrey*, 12 *Law J.*, 424, *ex.*
108. If the writ be served after the expiration of the four months, the proper course is for the defendant to apply to set it aside, and not to treat it as a nullity. *Hamp v. Warren*, 11 *Mees. & W.* 103.
108. Where an alias writ of summons, described the defend-

- ant as of the Isle of Wight, in the county of Southampton, and late of Waghen, in the county of York, it was holden to be no objection that the defendant in fact never resided in the county of York. *Windham v. Fenwick*, 11 *Mees. & W.* 102.
109. Where the writ was served in vacation, and the first day of term was the eighth after the service, it was holden sufficient to move in court on that day to set aside the service, and that it was not necessary to have applied to a judge for the purpose during the vacation. *Day v. Holly*, 2 *Dowl. N. C.* 974.
109. Where the defect in the copy of the writ served was, that it bore date in the year 1002, instead of 1842, and the application was to set aside the "writ or service," the court held it to be sufficient for the purpose of setting aside the service, and they made the rule absolute accordingly. *Wells v. Dawson*, 2 *Dowl. N. C.* 465.
110. *Distringas*.] It is no objection that a *distringas* is applied for against a peer, if the plaintiff do not attempt to proceed to outlawry upon it. *Houlditch v. Earl of Lichfield*, 12 *Law J.*, 80, *cp. Davis v. the same*, 1 *Dowl. N. C.* 363. Although the court will not grant it, for the purpose of proceeding to outlawry, they will grant it to compel an appearance. *Taylor v. Lord Stuart de Rothsay*, 2 *Dowl. N. C.* 121.
111. Where two of the calls were on the same day, it was holden insufficient. *Jamieson v. Wilkins*, 2 *Dowl. N. C.* 331. *See Mills v. Boulbee*, 1 *Dowl. N. C.* 707, *cont.*
111. The affidavit must state the locality of the defendant's residence. *Prims v. Giles*, 1 *Dowl. N. C.* 167. *Bradbee v. Gustard*, *Id.* 291.
111. Where the usual calls &c. were made at the defendant's "warehouse," in the city of London, the court granted the writ. *Elburne v. Marshall*, 1 *Dowl. N. C.* 188.
112. The affidavit must state upon what day the search was made for the appearance. *Maclean et al. v. Abrahams*, 10 *Law J.*, 318, *cp.*
113. A *distringas* returnable on a Sunday, is a nullity. *Morrison v. Manley*, 1 *Dowl. N. C.* 773.
113. The 15 days between the teste and return of a *distringas*, must be exclusive of both. *Chambers v. Smith*, 2 *Dowl. N. C.* 1057.
114. Where the writ of summons was indorsed for a debt with interest, without stating from what day, this, though probably an irregularity in that writ, was holden no objection to the court granting a writ of *distringas*. *Fitzgerald v. Evans*, 2 *Dowl. N. C.* 916, 12 *Law J.* 138, *cp.*

114. An affidavit to set aside a *distringas*, for the insufficiency of the affidavit on which it was granted, was holden insufficient, for not negating that the writ of summons had come to the hands of the defendant. *Muggeridge v. Ward*, 2 Dowl. N. C. 690.
116. An appearance by plaintiff for defendant, omitting the words "according to the statute," is irregular. *Codrington v. Curlewis*, 9 Dowl. 968.
116. It is only where the writ of summons has been personally served, that the plaintiff can enter an appearance for the defendant: where it was left for the defendant at his dwelling house, and his attorney afterwards produced the copy left, and promised to enter an appearance, but failed to do so, the court refused to allow the plaintiff to enter it for him. *Russell v. Lowe*, 2 Dowl. N. C. 233. But where the defendant himself came to the plaintiff's attorney with the copy of the writ in his hand, the court allowed it. *Aston v. Greathead*, *Id.* 547.
118. The affidavit for leave to enter an appearance for the defendant, after *nulla bona* returned to a *distringas*, must state that no appearance has been entered. *Reed v. Ford*, 12 Law J. 249, qb. 2 Dowl. N. C. 944.
118. Where the sheriff served the *distringas*, but returned *nulla bona*, Patteson, J. held it to be a case within the act, and allowed the plaintiff to enter an appearance for the defendant. *James v. Laurie*, 2 Dowl. N. C. 334.
119. The court will not compel the sheriff's officer to make an affidavit of the efforts he made to execute a *distringas*. *Raymond v. Smith*, 2 Dowl. N. C. 343.
120. The court will not grant a *distringas* for the purpose of proceeding to outlawry, against a peer, *Snape v. Earl of Waldegrave*, 12 Law J., 99, qb. 2 Dowl. N. C. 401. *Taylor v. Ld. Stuart de Rothsay*, 2 Dowl. N. C., 121, or member of the House of Commons. See *Cassidy v. Stewart*, 9 Dowl. 366, 10 Law J., 57, cp.
120. It must appear by affidavit that attempts have been made to serve the defendant with the writ of summons, and, if his residence be unknown, that endeavours have been made to find it. *Nugee v. Swinford*, 9 Dowl. 1038.
120. Where the defendant is abroad, facts must be shown by affidavit, from which it may fairly be inferred that he is there for the purpose of avoiding his creditors. *Round v. Brown*, 1 Dowl. N. C. 860.
122. One of the consequences of outlawry is, that the outlaw cannot afterwards sue in any action, or take any other proceeding at law or in equity for his advantage. But he may take proceedings to protect himself from the wrongful suit or proceedings of others; as for instance,

he may move to set aside proceedings against him for irregularity, or the like. This was decided by Wightman, J. in *Walker v. Thelluson*, 1 Dowl. N.C. 277, 11 Law J., 14, qb, and by Williams, J. upon another occasion between the same parties. 1 Dowl. N. C. 578. These cases are seemingly doubted by Patteson, J. in the subsequent case of *Burn v. Manning*, 12 Law J., 4, qb, where however his lordship ruled that the defendant having obtained a rule nisi to set aside a warrant of attorney to secure an annuity, and judgment thereon, on the ground of a defect in the memorial, before outlawry on the judgment was perfected against him, he might after the outlawry was completed proceed to make his rule absolute.

123. Where the return to a special *capias utlagatum* was bad, the inquisition finding that various lands of the defendant were in the possession of several individuals, without naming them,—the court, upon the application of the creditor and the sheriff, quashed the return. *Engler v. Annesley*. 1 Dowl. N.C. 186.
123. Where the *ca. sa.*, for the purpose of proceeding to outlawry upon final process, was made returnable *immediatè*, instead of having 15 days between the teste and return, the court refused to set it aside, but left the party to his remedy by writ of error. *Sandford v. Wyatt*, 2 Dowl. N. C. 2.
124. On setting aside an outlawry on payment of costs, the court will not by their rule limit any time for the payment of costs. *Bennett v. Gardiner*, 2 Dowl. N.C. 50.
125. *Capias.*] The words "about to quit England," in stat. 1 & 2 Vict. c. 110, s. 3, do not confine the proceeding by *capias* to persons domiciled in this country, but extend to persons permanently residing elsewhere, and in this country merely for a temporary purpose. *Lamond v. Effe*, 12 Law J., 12, qb. But a captain of a steam ship, regularly trading between an English port and Hamburgh, being about to depart on one of his regular voyages, is not a person "about to quit England," within the meaning of the act. *Atkinson v. Blake*, 1 Dowl. N. C. 849.
125. That section is also confined to cases where the application is made before judgment; and therefore a judge cannot make such an order upon a *sci. fa.* to revive a judgment. *Agassiz et ux. v. Palmer*, 3 Dowl. N. C. 18, 12 Law J., 245, cp.
125. The application for an order to arrest a defendant under that section, must be made to a judge at chambers; the



- court have no authority to entertain it. *Barnett v. Crano*, 1 Dowl. N.C. 774.
134. Patteson, J. is reported to have holden, that a *capias* may be granted against an attorney who is about to quit England; for the reason of his privilege, namely, his attendance on the court of which he is an officer, does not apply in such a case. *Thomson v. Moore*, 1 Dowl. N.C. 283.
145. An affidavit to hold to bail on an account stated, that the defendant is indebted to the plaintiff in a certain sum "upon and for the balance of accounts" between them, without stating the subject of the account on the part of the plaintiff, was holden bad. *Jones v. Collins*, 6 Dowl. 526. But where it was "upon the balance of accounts for goods sold and delivered by this deponent to the said J. M. D. and at his request," it was holden sufficient. *Kenrick v. Davis*, 1 Dowl. N.C. 347, 9 Mees. & W. 22.
146. That part of the affidavit shewing that the defendant is about to quit England, may be stated upon information and belief, if the deponent state the name and description of the person from whom he has had his information. *Gibbons v. Spalding*, 11 Mees. & W. 173.
147. The affidavit for a *capias* must be made recently before the application; otherwise the judge cannot be satisfied that the state of facts therein described still exists. Where, however, it was actually sworn before the making of the order, but by mistake was not then laid before the judge for his signature, and was not in fact signed by him until after the *capias* was sued out, and the defendant arrested: the court set aside the order, and discharged the defendant. *Bill v. Bament*, 8 Mees. & W. 317.
- 155, 160. Where there was a variance between the *capias* and the order, as to the sum for which the defendant was to be holden to bail, the order being for 422*l.*, and the writ and indorsement thereon for 422*l.* 13*s.* 4*d.*, the court allowed the writ and indorsement to be amended on payment of costs. *Plock v. Pacheco*, 9 Mees. & W. 342.
160. So, where the affidavit was at the suit of W. B. junior (his father being of the same name, and residing at the same place,) but in the *capias* the word junior was omitted, the court allowed the writ to be amended, on payment of costs. *Bilton v. Clapperton*, 12 Law J., 107, *ex.*, 1 Dowl. N.C. 386.
160. So, where the *capias* rightly described the plaintiff as the public officer of the Western District Banking Company, but in the affidavit he was described as the public

- officer of the Western District Banking Company for Devon and Cornwall, and a rule nisi was obtained to rescind the judge's order and discharge the defendant on the ground of this variance: the court discharged the rule without costs, upon filing another affidavit, omitting the words "for Devon and Cornwall." *Richards v. Dispraile*, 11 *Law J.*, 108, *ex. 1 Dowl. N.C.* 384.
161. Upon moving to rescind the judge's order and discharge the defendant, the affidavit on which the order was made should be brought before the court or judge; *Needham v. Bristowe*, 4 *Man. & Gr.* 262. *Heath v. Nesbitt*, 11 *Mees. & W.* 176, 2 *Dowl. N.C.* 1041; unless perhaps in cases where the defendant does not seek to contradict the facts therein stated. *Per Creswell, J. in Needham v. Bristowe*. But the plaintiff, in shewing cause, is not confined to that affidavit, but may use fresh affidavits, if he wish it. *Gibbons v. Spalding*, 11 *Mees. & W.* 173.
163. A barrister is not privileged from arrest in returning from his attendance at petty sessions, not being retained to go there, although when there he was engaged to defend a person charged with an assault. *Newton v. Constable*, 2 *Ad. & El. N.C.* 157.
164. An attorney, party in a cause in which a motion was about to be made in court, left his private residence with intent to call at his office for some papers, but on the way to his office he was arrested under a *ca. sa.*: the court ordered him to be discharged, holding that he was privileged from arrest both as party in the cause, and as attorney in the motion. *Williams v. Webb*, 12 *Law J.*, 89, *cp. 2 Dowl. N.C.* 660.
170. *Bail Bond.*] The plaintiff, by declaring in chief, does not now waive his right of proceeding against the sheriff or upon the bail bond. *R. v. Sh. of Montgomeryshire*, 1 *Dowl. N. C.* 388. 11 *Law J.*, 109, *ex.* And the same although he deliver the issue and give notice of trial. *Betts v. Smyth*, 2 *Ad. & El. N. C.* 113.
170. Where bail above is not put in in time, and the plaintiff elects to proceed upon the bail bond, he must still proceed in the original action; for the *capias* not being process in the action, but merely sued out for the purpose of securing that the defendant shall be forthcoming when the amount of the debt shall be ascertained, the bail bond is merely security for the payment of the debt which may be found to be due, in case the defendant absconds and does not put in and justify bail above. *Ede v. Collingridge*, 12 *Law J.*, 247, *ex.* 11 *Mees. & W.* 61.
173. In moving to set aside regular proceedings on a bail bond

at the instance of the defendant in the original action, it is not necessary that there should be an affidavit of merits, as formerly, as the reason for the rule on that subject has ceased; for now the plaintiff may proceed in the action, notwithstanding bail be not perfected in time, and the bail is merely 'by way of security, in case the defendant should abscond. *Id.*

175. Where a defendant, arrested by order upon a *capias*, deposits money with the sheriff in lieu of bail, and fails to put in bail in due time, the plaintiff is entitled to take the money out, without waiting for the final determination of the suit, since the statute 1 & 2 Vict. c. 110, in the same manner as before it. *Tuton v. Gale*, 1 Dowl. N. C. 383.
  
203. *Bail.*] Where the *ca. sa.* to fix bail, was indorsed "*non est inventus*," but the defendant, knowing of it, went to the sheriff's office, and surrendered himself, and he was thereupon detained and sent to the sheriff's prison: it was holden that the sheriff had done rightly, and was entitled to the poundage from the plaintiff. *Magnay et al. v. Monger*, 12 Law J. 306, *qb.*
  
217. *Proceedings against Traders.*] Where a party having obtained an award for a sum of money against another, gave him notice under stat. 1 & 2 Vict. c. 110, s. 8, and a bond was accordingly given with sureties: the court held that this did not prevent the former party from proceeding to enforce the payment of the sum awarded by attachment. *Mendell v. Tyrrell*, 1 Dowl. N. C. 453.
  
217. Where the defendant, having rendered in discharge of his sureties, moved to have the bond delivered up to be cancelled: the court refused the rule, saying that they might as well be asked, in an ordinary case, to order a bond to be delivered up on an affidavit that the condition had been performed. *Ridler v. Chapellow*, 1 Dowl. N. C. 637.
  
220. *Removal of Causes.*] The affidavit to move for leave to sue out execution upon a judgment of the court of Common Pleas at Lancaster, should pursue the language of stat. 3 & 4 W. 4, c. 62, s. 31, and be intitled in the superior court. *Wigden v. Birt*, 1 Dowl. N. C. 93, 372, 9 Mees. & W. 50.
  
222. *Declaration.*] Upon process describing the plaintiff to be "executor," but not that he sued out as such, a decla-

- ration in his own right was holden regular. *Free v. White*, 1 Dowl. N. C. 586.
222. An objection that the declaration varies from the process in the cause of action, is not waived by the defendant's taking the declaration out of the office. *Driver v. Harrison*, 3 Dowl. N. C. 72.
224. As to striking out counts, where a declaration contains two or more counts for the same cause of action,—See *Bleaden v. Rupallo*, 9 Dowl. 857, *Deere v. Ivey*, 12 Law J., 132, qd, *Temperley v. Brown*, 1 Dowl. N. C. 310, *Arden v. Pullen*, Id. 612, *Blyth v. Shepherd*, Id. 880.
- 225, 228. The plaintiff has the whole of the next term after appearance, to declare, whether the appearance be entered in term or vacation; and judgment of non pros cannot be signed before the end of that next term. *Foster v. Pryme*, 8 Mees. & W. 664.
226. Where the notice was of a declaration in debt, and the declaration and writ were in assumpsit, it was holden that the objection was not waived by the defendant's taking the declaration out of the office. *Heywood v. Fayrer*, 1 Dowl. N. C. 256.
226. If there be any doubt as to the validity of the notice given, or whether any has been given, if the plaintiff afterwards wish to sign judgment as for want of a plea, he must do so at his peril; the court will not assist him by giving any leave to do so. *Spriggins v. White*, 9 Dowl. 1000.
227. *Particulars of Demand*.] Giving credit in particulars of demand for a sum of money paid, has the same effect as a plea of payment of that sum, except that it cannot be deemed an admission by the defendant of any of the items in the account. *Goatley v. Herring*, 12 Law J., 32, cp.
229. *Non pros*.] Where a wrong person was served with declaration, and she entered an appearance thus "P. M. sued as S. M.," and demanded a declaration; her attorney was then informed that it was S. M. and not P. M. that was intended to be sued, but he persisted in treating it as an action against P. M., and signed judgment of non pros: Coleridge, J. set aside the judgment with costs. *Walker v. Midland*, 3 Dowl. N. C. 159.
230. Where a regular judgment of non pros was set aside upon payment of costs, this was holden to mean costs of the judgment, and of resisting the application to set it aside; and that where the defendant's attorney refused to attend a peremptory appointment to tax the costs, the master might tax them at the nominal sum of 3s. 4d., and upon tender of that sum, the plaintiff might treat

the judgment as set aside, and proceed to trial. *Christie v. Thompson*, 1 Dowl. N. C. 592.

- 231. *Change of Venue.*] Where an action upon a written agreement, not under seal, to perform a certain work in the county of L, was brought elsewhere: the court held that the defendant might move to change the venue upon the common affidavit, and seemed to think that the exception as to actions on written instruments was confined to actions on specialties, and on bills of exchange and promissory notes. *Mondel v. Steel*, 8 Mees. & W. 640, 12 Law J., 91, *ex.* But it cannot be changed, on the common affidavit, in an action on an award under seal. *Martin v. Davis*, 12 Law J., 472, *ex.*
- 232. The court refused a rule to bring back the venue, without the usual undertaking, in an action by assignees of a bankrupt, although it was sworn that allowing the venue to remain would occasion delay in winding up the affairs of the bankrupt. *Nicholson et. al. v. Allcroft*, 12 Law J., 45 *ex.*
- 233. Where there was an undertaking to give material evidence in the county, it was holden that it was incumbent upon the plaintiff to prove at the trial that the matter of such evidence arose within the county. *Brace v. Thompson*, 11 Law J., 131, *qb.*
- 236. In an action to try the right of defendant as pound keeper of a pound in Surrey to certain fees, the plaintiff laid the venue in London, but moved to change the venue to Surrey, as his witnesses lived there, and a jury of Surrey would understand a rural matter such as this, better than a jury of London: Williams, J. refused the motion, as the plaintiff had it in his power to lay the venue in Surrey, in the first instance, if he wished it. *Fife v. Bougfield*, 2 Dowl. N. C. 705.
- 236. Where the venue was changed from Bristol to Berks, upon the common affidavit, but at the assizes the cause was made a remanet; the plaintiff applied to have it changed to Middlesex, on the ground that one of his witnesses was so ill that he was likely to die before the next assizes, and obtained the rule upon payment of all costs to be thereby incurred by the defendant beyond what it would cost him to try in Berks; the plaintiff's witness however died before the cause could be tried in Middlesex, and the defendant then moved to change the venue back to Berks: but the court refused this, except upon the terms of the defendant paying any costs which might thereby be occasioned to the plaintiff. *Webb v. Bulkeley*, 2 Dowl. N. C. 900.

239. *Consolidation of Actions.*] Three several actions were brought against three obligors on a joint and several bond, conditioned for the good conduct of the manager of a joint stock banking company: the court, upon application of the defendants, ordered that the plaintiff might select which of the three actions he would proceed in, and that proceedings in the other two should be stayed until the trial of that one; but that the plaintiff should not be bound by the event of the first trial, or prevented from proceeding in the others afterwards, if he then should think fit. *Anderson et al. v. Towgood*, 1 *Ad. & El. N. C.* 245.
239. So where five separate actions were brought on five distinct guaranties of £50 each, to secure the payment of £250 from M. to the national provincial bank of England, a judge at chambers stayed the proceedings in four of them, the defendants undertaking to be bound by the verdict in that one, if it should be to the satisfaction of the judge who should try the cause, and the plaintiff to be at liberty to open the rule after plea, on the ground that the issue would not decide the merits in the other actions: the court held this to be a proper order. *Sharp v. Lethbridge et al.*, 4 *Man. & Gr.* 37, 11 *Law J.*, 189, *cp.*
239. In two actions between the same parties on two several bills of exchange, the court consolidated them, even after issue joined and notice of trial given, upon payment by the defendant of the costs of the second action, up to the time. *Booth v. Payne*, 1 *Dowl. N. C.* 348, 11 *Law J.*, 256, *ex.*
240. *Inspection of Books, &c.*] The usual limited inspection of the court rolls of a manor, was ordered to be given to a devisee of a rent charge on certain copyholds of the manor, although he himself was not a copyholder. *Ex p. Barnes*, 2 *Dowl. N. C.* 20.
245. *Discontinuance.*] Where the plaintiff took a step in the cause, after the defendant had given him notice under the insolvent act, it was holden that he could not afterwards discontinue the action, without payment of costs. *Ford v. Stock*, 1 *Dowl. N. C.* 763.
245. *Security for costs.*] The defendant in an ordinary action, by giving notice of trial by proviso, does not become such an actor in the suit as to render him liable to give security for costs. *Ford v. Stock*, 1 *Dowl. N. C.* 763, *supra*. See *Doe v. Brool*, *Id.* 857, *infra*.
246. Where a private in the East India Company's service, whilst

- abroad, brought an action in this country, the court refused to stay proceedings until he should give security for costs, although it was stated to be the custom of the company to enlist their soldiers for life, and not to allow them to return to this country, unless discharged. *Garwood v. Bradburn*, 9 Dowl. 1031.
249. Where a defendant in ejectment went to reside in Scotland in May, after issue joined, and the lessor of the plaintiff allowed him to move for judgment as in case of a nonsuit in November, and to give notice of trial by proviso, in February: it was holden that the plaintiff was too late to apply for security for costs in the Easter term following. *Doe v. Brood*, 1 Dowl. N. C. 857.
251. After the master had fixed the amount of the security, the court refused to interfere to reduce it. *French v. Maule*, 4 Man. & Gr. 107.
251. Where upon a motion that a plaintiff, residing out of the country, should give security for costs, it appeared that he had already obtained judgment against the defendant in another action for £20,000, which remained unsatisfied; the court discharged the rule, upon the plaintiff's undertaking to allow any costs he might be liable to in the present action, to be set off against the judgment. *Bristowe v. Needham*, 2 Dowl. N. C. 658.
251. Upon a motion to discharge a rule for security for costs, on the ground that the plaintiff had returned to this country, permanently to reside here, and the affidavit of this appeared to be made by a clerk to his attorney: Wightman, J. refused the rule on this account, saying that the affidavit should have been made by the plaintiff himself. *Thrasher v. Busk*, 2 Dowl. N. C. 51.
252. *Particulars of Demand.*] Where the particulars annexed to the record were for £4 19s. on an account stated, and the under sheriff refused to receive evidence of money lent, and nonsuit the plaintiff: the court set aside the nonsuit, it appearing that in the particulars delivered with the declaration, there was a claim for money lent. *Ripper v. Walton*, 1 Dowl. N. C. 344.
253. The court will not order particulars in trespass, merely upon the defendant's affidavit that he does not know the grievances intended to be relied on; some special grounds must be stated. *Horlock v. Lediard*, 12 Law J., 33, ex. 2 Dowl. N. C. 277.
253. Where the defendant pleaded not guilty "by statute," the court, upon the plaintiff's affidavit that he could not discover the statute, ordered that the defendant

- should point it out, otherwise the words "by statute," should be struck out of the margin of the plea. *Coy v. Ld. Forrester*, 9 Doucl. 770.
253. Where in particulars of set off, the defendant claimed a set off for the plaintiff's dishonoured *acceptances* due in August, and it turned out to be a dishonoured bill due in August, which the plaintiff had *indorsed* to the defendant: the court held that the plaintiff could not have been misled by the variance, and that it was therefore immaterial. *Parsons v. Wilson*, 1 Doucl. N. C. 181. 11 Law J., 10, *cp.*
254. Where the plaintiff gives credit in his particulars for a payment, it is the same in effect as if the payment were pleaded, except that it shall not be deemed any admission on the part of the defendant of the other items in the account. *Goalley v. Herring*, 12 Law J., 32, *cp.*
254. Under a particular, on a count for work and labour, for one quarter's work, it was holden that the plaintiff might recover for a month's wages. *Hurcum v. Stericker et al.* 2 Doucl. N. C. 524, 12 Law J., 17, *ex.*
254. Where a declaration contained two counts on two promissory notes for 50*l.* each, and a count on an account stated, and the particulars were, that the plaintiff sought to recover 50*l.* on the note in the first count stated, and 50*l.* on the note in the second count, for the recovery whereof he would avail himself of all or any part of the declaration; and no evidence was given of the notes, but the plaintiff merely proved an admission of the defendant that he was indebted to him in 100*l.*: the court held that under these particulars, this evidence could not be given in support of the count on the account stated. *Roberts v. Elncorth*, 2 Doucl. N. C. 456.
255. *Staying proceedings.*] In practice, it is very usual for the defendant in an action to consent to a judge's order to stay proceedings upon payment of debt and costs on a certain day, or by instalments, upon the terms of the plaintiff being at liberty to sign judgment in case the debt and costs shall not then be paid; and a judge's order is drawn up accordingly. Such consent is not deemed in substance a *cognovit*, and therefore does not require to be attested, nor does it require a stamp. *Bray v. Manson*, 8 Mees. & W. 668. *Baker v. Flower*, *Id.* 670. *Thorn et al. v. Neal*, 2 Ad. & El. N. C. 726.
258. In debt on replevin bond, the court stayed the proceedings upon payment of the single value of the goods,



double costs in the replevin suit (which now would be costs as between attorney and client, see stat. 5 & 6 Vict. c. 97, s. 1,) and the costs of the application. *Meyers v. Lockwood et al.* 11 *Law J.*, 47, *qb.*

259. Where an ejectment was brought in the Common Pleas for a forfeiture, and an application was made to stay the proceedings in it on the ground that another ejectment for a forfeiture between the same parties, to recover the same premises, was pending in the court of Queen's Bench: the court refused to interfere, as the acts of forfeiture appeared to be distinct, and occurred at different times. *Doe v. Gustard*, 2 *Dowl. N. C.* 615.
261. A rule nisi to stay proceedings in ejectment, until the costs of a former ejectment be paid, was discharged, on the lessor of the plaintiff swearing that his present claim was not founded on the same title previously litigated, although he did not state under what title he now claimed. *Doe v. Bennett et ux.* 9 *Dowl.* 1012.
261. Where several successive ejectments are brought for the same property, though none of them are tried, the court will stay the proceedings in a subsequent ejectment until the costs of the former actions are paid. *Doe v. Standish*, 2 *Dowl. N. C.* 26.
261. Where several ejectments had been brought unsuccessfully by a party, and another ejectment was brought as upon a vacant possession, and judgment and execution obtained by a person appearing to claim under him,—the court set aside the judgment and execution, and ordered the further proceedings in the action to be stayed until the costs of the former actions were paid. *Harvey v. Baker*, 2 *Dowl. N. C.* 75.
264. In an action for a debt in the court of Queen's Bench, tried before the undersheriff, where the plaintiff recovered under 40s., Wightman, J. refused to stay the proceedings on payment of the amount of the verdict without costs, although the debt might have been sued for in the county court; the statute 43 El. c. 6, s. 2, which enables a judge at nisi prius to certify, in order to deprive a plaintiff of costs in such a case, does not extend to trials in inferior courts, and this motion if granted would have the same effect. *Salmon v. Tugman*, 2 *Dowl. N. C.* 977. 12 *Law J.*, 268, *qb.*
264. Where an affidavit, to stay proceedings in an action for 1l. 5s. stated that the defendant was served with the writ in the county of M. where he and the plaintiff were then residing, and within the jurisdiction of a county court to which the defendant was liable to be summoned: this was holden insufficient, as not showing

- that the defendant was resident there at the commencement of the action. *Dowling v. Powell*, 2 Dowl. N. C. 1025. 12 Law J., 295, *ex.*
264. Where a fiat in bankruptcy was annulled by consent of the creditors, and the bankrupt brought an action of trover against the official assignee to recover possession of his books ; pending this action a second fiat issued, and the same person was appointed official assignee : the court stayed the proceeding in the action, at the instance of the defendant, upon his paying the plaintiff's costs up to the date of the second fiat. *Ouchterlony v. Gibson*, 3 Dowl. N. C. 1.
265. *Oyer.*] A party craving oyer, is not entitled to a copy of an indorsement on the deed, which was made after the deed was executed, although it be admitted that it may be such as to alter the effect of the deed. *Smith v. Goldsworthy*, 1 Dowl. N. C. 288.
268. *Interpleader.*] Where a factor became bankrupt, and his assignee sued for the price of goods sold by him, and a third party claimed the produce of the goods as being the consignee of them : the court held the defendant to be entitled to the benefit of the interpleader act. *Johnson v. Shaw*, 12 Law J., 112, *cp.*
268. So, where a trustee under a marriage settlement lodged some of the trust funds with a banker, and afterwards becoming a bankrupt, his assignee sued the banker for the amount, the bankrupt at the same time claiming it as trustee : the court held this to be a case within the interpleader act, and ordered an issue to try whether the money in question was the property of the cestui que trust. *Frost et al. v. Hayward et al.*, 12 Law J., 242 *ex.* 2 Dowl. N. C. 801.
268. But where a sum was placed in the hands of a stakeholder, to abide the event of an illegal race, and the stake was claimed by two parties, one of whom brought an action for it : the court refused to interfere, saying that the defendant had a defence to the action. *Applegarth v. Colley*, 2 Dowl. N. C. 223.
270. The application under the interpleader act must be made before plea, and the affidavit must shew it ; but if the affidavit be defective in this respect, it may be amended. *Frost et al. v. Hayward et al. supra.*
270. Where goods were delivered to a carrier, consigned to J.S., and the assignees of J.S. and two other parties claimed them, and one of the parties having brought trover for them against the carrier, the assignees relinquished their claim ; afterwards an interpleader order was obtained

from a judge, that unless cause should be shewn to the contrary, the assignees should be barred, and should pay the carrier's costs, and the assignees having attended before the judge for the mere purpose of objecting to the costs, the order was discharged; afterwards other summonses were taken out, which the assignees did not attend, and ultimately the judge made an order in their absence that they should pay these costs: the court held that the judge had no authority to make this order, as the attendance of the assignees before him for the purpose of resisting an order for costs only, was not an appearance within the meaning of the statute. *Grasebrook et al. v. Pickford et al.* 12 *Law J.*, 171, *ex. 2 Dowl. N. C.* 248.

271. A party entitled to costs under the interpleader act, may recover them either in the manner directed by that act, or by execution under stat. 1 & 2 Vict. c. 110, s. 18; and if he proceed under the latter act, he need not enter the order for them upon record. *Cetti et al. v. Bartlett*, 1 *Dowl. N. C.* 928, 9 *Mees. & W.* 840.
271. Where an interpleader summons has been heard at chambers, the court have no jurisdiction as to costs; the party must apply to the judge before whom the summons was heard. *Burgh v. Schofield*, 2 *Dowl. N. C.* 261.
273. *Plea.*] Where to an action for money lent, the defendant pleaded that in a former action brought by him against the plaintiff, the latter set off the debt for which this action was now brought, and in that action the now defendant recovered a verdict: this was holden not to be a plea of judgment recovered, so as to require the number of the roll, &c. to be inserted in the margin of the plea. *Brokenshir v. Monger*, 9 *Mees. & W.* 111.
273. The court will not set aside a plea of release, unless it be made out clearly that a fraud is attempted to be practised upon the plaintiff by the release, and that the defendant is a party to the fraud. *Phillips et al. v. Cluggett*, 2 *Dowl. N. C.* 1004.
274. Where to an action on a promissory note by payee against maker, the defendant pleaded that he made it without consideration, and that at the time it was agreed that he should not be called upon to pay the same, when due, if he was unable, but that it should be renewed: upon application by the plaintiff, shewing that this plea was wholly false, the court set it aside, as being absurd and tricky, as well as false. *Mitford v. Finden et al.*, 8 *Mees. & W.* 511.
276. Where a plea was dated and delivered on the 23rd October, the court held it to be a nullity, and that the plaintiff

might sign judgment; but as, instead of doing so, he treated it as an irregularity merely, and moved to set it aside, he ought to have made his application within four days after the expiration of the time for pleading. *Mills v. Brown*, 9 Dowl. 151.

278. Where ten days' time to reply were given on the 24th March, and the five following days being holydays did not reckon, Coleridge, J. held that a judgment signed on the 8th April was not signed too soon. *Liffin v. Pitcher*, 1 Dowl. N. C. 767, *Qu.*
278. Where in an action for penalties, an application was made for a further time to plead, on the ground that a bill was to be brought into parliament to relieve the party of the penalties, and that the plaintiff's attorney consented not to oppose the bill: the court refused to interfere. *Grant v. Ridley*, 12 Law J., 151, *cp.*
279. To an action by indorsee against indorser of a bill of exchange, a plea that the plaintiff had persuaded the acceptor not to pay the bill, was holden not to be an issuable plea. *Bateson v. Lee*, 12 Law J., 338, *qb.* 3 Dowl. N. C. 224.
279. In an action of covenant on an annuity deed, a plea that the deed was made with a view to charge the annuity upon a rectory, contrary to stat. 13 El. c. 20, and made for the purpose of evading the statute,—was holden not to be an issuable plea, as the statute avoided the charge upon the benefice only, and not the deed containing it. *Sloane v. Packman*, 12 Law J., 423, *ex.*
279. In an action upon a bill of exchange against the acceptor, the defendant pleaded that he did not accept the bill, nor did the plaintiff give any greater value for it than 10l., concluding with a verification,—this was holden not to be an issuable plea. *Myers v. Lazarus*, 1 Dowl. N. C. 316.
279. Where the defendant pleaded two pleas, which were in substance an answer to one of the counts of the declaration only, but in form were pleaded to the whole declaration: the court held that they were not issuable pleas. *Parratt v. Goddard et al.*, 1 Dowl. N. C. 874, 11 Law J., 217, *ex.*
279. In an action against a member of a joint stock company, which by act of parliament might sue or be sued in the name of their secretary or one of the directors,—a plea that the defendant was not secretary or a director of the company, and that the promise was made by him jointly with the other members, was holden not to be an issuable plea. *Blewett v. Gordon*, 11 Law J., 201, *qb.*
279. But where to an action on an indenture of apprenticeship against the father of the apprentice for breaches of

- covenant by his son, the defendant pleaded that the apprentice was bound to the plaintiffs as co-partners, and that before any breach, they had dissolved partnership: the court, without expressing any opinion as to the validity of the plea, held that as it appeared to raise a fair question for argument, it was an issuable plea. *Lloyd et al. v. Blackburn*, 11 *Law J.*, 210, *ex.*, 1 *Dowl. N. C.* 547.
279. Where in an action on a bill of exchange by indorsee against the acceptor, the defendant pleaded that the drawer before and at the time of his indorsing the bill was indebted to the defendant, and in order to deprive the defendant of his right of set off, and in collusion with A, B, C, and the plaintiff, he indorsed it to A, A to B, B to C, and C to the plaintiff, there being no consideration for any of such indorsements; and secondly, the defendant pleaded that the drawer, before he indorsed the bill, petitioned for relief under the insolvent debtor act:—these pleas were holden to be issuable pleas. *Watkins v. Bensuran*, 1 *Dowl. N. C.* 615.
279. Where to an action for premiums of insurance, the defendant pleaded a set off of 1500*l.* for a total loss on a policy of insurance upon freight: the court held that as the plea raised a question deserving of argument, it should be deemed an issuable plea. *Thompson v. Redman*, 12 *Law J.*, 310, *ex.*, 2 *Dowl. N. C.* 1028.
279. Obtaining time to reply, is a waiver of an objection that a plea is not issuable. *Trott v. Smith*, 9 *Mees. & W.* 765.
280. Rejoining gratis, means rejoining without any rule to rejoin; but the defendant has four days to rejoin, from the delivery of the replication, in the same manner as if a rule to rejoin had been thus given. *Addins v. Anderson*, 10 *Mees. & W.* 12, 11 *Law J.*, 228.
280. Being under terms to take short notice of trial for a particular term or sittings, &c., does not oblige the defendant to take any other than the ordinary notice, if given for a subsequent term or sitting, &c. *Slatter v. Painter*, 8 *Mees. & W.* 672.
281. Where two rules to plead were entered thus,—“*Davies v. Tidmarsh, Sann v. Edmeads, Rules to plead,*”—it was holden sufficient, and said to be usual in practice. *Davis v. Edmeads*, 1 *Dowl. N. C.* 423.
281. Where the rule to plead was entered on the 6th June, it was holden that the defendant had the whole of the 10th, to plead. *Dunn v. Hodson*, 3 *Dowl. N. C.* 204.
- 283, 275. Where a special plea, concluding to the country, was pleaded to one of the counts in the declaration, and the general issue to the other counts, without signature of counsel, and the plaintiff therefore signed judgment as for want of a plea, the court held that he was

- warranted in so doing; for the rule of court which orders that it shall not be necessary that any pleadings which conclude to the country shall be signed by counsel, means, such pleas as properly conclude to the country. *Stevens v. Angell*, 12 *Law J.*, 350, *qb*.
- 283, 275. A plea of the statute of limitations, although it need not conclude with a verification, must nevertheless be signed by counsel. *Roberts v. Howard*, 9 *Mees. & W.* 838.
- 283, 275. But where the defendant demurred to the first count of the declaration, and pleaded the general issue to the other counts, all properly dated and signed by counsel; the defendant afterwards had judgment on the demurrer, and then obtained an order for leave to add certain special pleas, which he delivered without date, and without counsel's signature: the court held that the plaintiff was not warranted in signing judgment for want of a plea as to the 2nd and subsequent counts of the declaration, on this account; because the general issue remained, which was well pleaded. *Badman v. Pugh*, 12 *Law J.*, 126, *cp*.
284. Where under an order for leave to plead several matters, the defendant pleaded a plea to the whole declaration, and also demurred to one of the counts, and the plaintiff signed judgment as for want of a plea: the court refused to set aside the judgment, except upon the terms of the defendant's withdrawing the demurrer, and paying the costs occasioned by his defective pleading. *Baily v. Baker*, 9 *Mees. & W.* 769.
284. Where not guilty "by statute" is pleaded, the court or a judge will not allow the defendant also to plead specially. *Legge v. Boyd*, 9 *Dowl.* 39.
284. In an action against a registered officer of a banking company, the court refused to allow him to plead that he was not such registered officer, together with pleas going to the merits; if he relied on the one defence or the other, let him plead it by itself. *Needham v. Law*, 2 *Dowl. N. C.* 1027.
284. If on application to a judge at chambers he allow some of the pleas required, but not all, the defendant may apply to the court for leave to plead the others also; and in such a case it is not necessary that the rule nisi should be drawn up on reading the rule to plead several matters already granted. *Smith v. Goldsworthy*, 11 *Law J.*, 151, *qb*. 2 *Ad. & El. N. C.* 717.
285. The court will, in their discretion under stat. 4 Ann. c. 16, allow a party to plead several matters, although a judge at chambers has disallowed the pleas as being in apparent violation of the new rules. *Pym v. Grazebrook, et al.*, 11 *Law J.*, 112, *cp*.

285. The court have no power to strike out pleas which have been allowed by a judge at chambers; the proper form of application in such a case is, to move to rescind the judge's order. *Turquand et al. v. Hawtrey et al.*, 11 *Law J.*, 294, *ex. 1 Dowl. N. C.* 925.
285. Where the defendant applied to a judge for leave to plead a set off of a debt of 100*l.* due upon a wager, and was refused; he then pleaded, without leave, a general traverse of all except 100*l.*, and as to that 100*l.* the set off: upon an application to set aside these pleas as pleaded in contempt of the judge's authority, it was holden that the court had no authority to do so; for as they were pleaded to different parts of the declaration, they were pleaded as at common law, and not under stat. 4 Ann, c. 16, which applied only to cases where two or more pleas are pleaded to the same part of the declaration. *Daniels v. Lewis*, 1 *Dowl. N. C.* 844.
286. In covenant the defendant applied for leave to plead a set off of a guarantie under seal: but it was refused, because a guarantie, which sounds in damages only, cannot be the subject of a set off. *Williams et ux. v. Flight*, 2 *Dowl. N. C.* 11.
290. In an action by an attorney upon his bill, the defendants paid 52*l.* into court to cover the demand up to a certain time, and they pleaded it, with a denial of damages ultra, in the ordinary way: it was holden that this admitted a claim to the extent of 52*l.* only, and that the defendants might deny any retainer of the plaintiff with respect to the other parts of the bill. *Stevenson v. the Mayor of Berwick*, 1 *Ad. & El. N. C.* 154.
296. In moving for judgment on *nul tiel record*, in debt on judgment, if the plaintiff would move also for the costs of the action, it must of course be upon affidavit, and the court will grant but a rule nisi as to the costs. *Fraser v. Moses*, 1 *Dowl. N. C.* 705.
298. Where in an action against a feme covert, she pleaded her coverture, but without an affidavit to verify it, and the plaintiff signed judgment: the court held that it was a dilatory plea, requiring an affidavit of verification, although it was stated that part of the cause of action accrued after her marriage: and they therefore held the judgment to be regular. *Lovell v. Walker*, 9 *Mees. & W.* 299.
298. Where in an action against an attorney in the Common Pleas, he pleaded that he was an attorney of the court of Queen's Bench and not of the Common Pleas, but the affidavit to verify the plea was intituled "Between Sophia Fletcher administratrix, &c. plaintiff, and William Letchmere defendant;" and because the title of the affidavit did not state the right in which the plainti

- sued, in full, but substituted an &c. for it, the court set aside the plea for irregularity. *Fletcher v. Letchmere*, 12 *Law J.*, 151, *cp.*
300. Where an affidavit verifying a plea of nonjoinder states the residence of the party not joined, and the plaintiff upon inquiry finds that he was not resident there at the time the plea was pleaded, he may move to set aside the plea. *Wheatly v. Golney*, 9 *Dowl.* 1019.
303. In an action against some of the members of a club for the price of wine furnished to it, one of the other members of the club was called as a witness for the plaintiff, and his competency being objected to, the plaintiff executed a release, and gave it to him; the defendants then applied for leave to plead this release *puis darrein continuance*, which was objected to because the jury had been sworn, and the judge reserved the point for the opinion of the court, the plea being considered as pleaded and verified; the court held that the judge was bound to receive the plea, although tendered after the jury were sworn. *Todd et al. v. Emly et al.* 12 *Law J.*, 142, *ex.* 1 *Dowl.* 598.
303. Where a plea *puis darrein continuance* of the plaintiff's bankruptcy, stated the appointment of an official assignee, that within eight days before the time of pleading creditors' assignees were appointed: the plea was holden bad, because it did not shew that the official assignee had been appointed within the eight days. *Dunn et al. v. Hill et al.* 2 *Dowl. N. C.* 1062.
304. Where the four days' time to plead in a town cause expired on the 30th May, but on that day the defendant obtained a rule to change the venue to Surrey, which was served before ten o'clock on the 31st, but as no plea was pleaded, the plaintiff signed judgment as for want of a plea on that day: the court held the judgment to be irregular, because at the time the judgment was signed, and indeed before the expiration of the first four days, the cause was a country cause, and the defendant entitled to the extended time for pleading. *Nichols v. Stockbridge*, 2 *Dowl. N. C.* 96.
306. In moving to set aside a judgment by default, if the defendant make an affidavit of merits, it is not competent to the plaintiff to make an affidavit in answer shewing that there are no merits. *Per Coleridge, J. in Blewitt v. Gordon*, 1 *Dowl. N. C.* 820.
312. Where the defendant had gone to Australia, the court allowed the plaintiff to serve the notice of inquiry, by leaving the same for the defendant at his last place of abode, and sticking up a copy in the master's office. *Probin v. Locock*, 1 *Dowl. N. C.* 197.



315. *Rule to compute.*] In the Queen's Bench and Exchequer a rule to refer it to the master to compute principal and interest, is always founded on an affidavit of the cause of action, and that interlocutory judgment has been signed and when ; in the Common Pleas an affidavit is not necessary. *Bridport v. Jones*, 3 *Man. & Gr.* 637.
315. If there be but one action, there can be but one rule to compute, although there be two defendants, and judgments by default have been signed against each separately. *Field v. Pooley*, 3 *Man. & Gr.* 756.
315. Service of rule to compute upon the sister of the defendant at his residence, with whom notes and papers were before usually left, was holden sufficient. *Archer v. Evans*, 1 *Dowl. N. C.* 861.
315. Where the rule *nisi* to compute was served, by putting it into the letter-box at the defendant's counting-house, and his clerk the next day said that he had taken it out of the letter-box, and given it to the defendant ; this was holden sufficient. *Rayner v. Hodges*, 1 *Dowl. N. C.* 863.
315. Where the rule *nisi* was put through the door of the chambers of the defendant's attorney, there being a printed notice there to that effect, it was holden sufficient. *Warren v. Thompson*, 2 *Dowl. N. C.* 224.
315. Where the rule *nisi* was served upon the daughter of the defendant's landlady, at his lodgings, in the house in which he lodged, and where he had been personally served with notice of declaration, it was holden sufficient. *Lawes v. Scales*, 2 *Dowl. N. C.* 342.
315. Service upon the landlady at the defendant's lodgings, where he had ceased to reside, but which he had not actually given up, and she subsequently said that she had given the copy of the rule to the defendant : this was holden to be sufficient. *Clarke v. Roberts*, 1 *Dowl. N. C.* 778.
315. Service upon the landlord of the hotel where the defendant, his wife and servant, were residing, was holden sufficient. *Gosling v. Best*, 1 *Dowl. N. C.* 333.
315. But service on the defendant, a publican, leaving a copy of the rule with " a person " at his bar, was holden insufficient, for there was nothing to connect the person served with the defendant. *Monroe v. Reader*, 1 *Dowl. N. C.* 564.
315. So, service of the rule upon a female, whom the deponent believed to be a friend of the defendant, staying at his house, and authorized to receive messages for him, was holden insufficient. *Brandon v. Edmonds*, 2 *Dowl. N. C.* 225.
315. So, service of the rule by leaving it with — Hitchcock,

at the defendant's residence, and that — Hitchcock promised to deliver the same to the defendant, was holden insufficient, without shewing how Hitchcock was connected with the defendant. *Taylor et al. v. Whitworth*, 11 *Law J.*, 137, *ex.*

316. It cannot be shewn, as answer to a rule to compute, that the action was commenced before the bill was due ; this should be made the subject of a substantive motion. *Luxford v. Groombridge*, 12 *Law J.*, 99, *qb.*
318. *Replication, &c.*] Where ten days' time to reply was given on the 25th March, and the five following days were holidays, a judgment signed on the 8th April was holden not to be too soon. *Liffin v. Pitcher*, 1 *Dowl. N. C.* 767, *Qu.*
319. *Demurrer.*] Instances of frivolous demurrers. *Twight v. Prescott*, 2 *Dowl. N. C.* 4. *Shelton v. Halstead*, *Id.* 69. *Gurney v. Hill*, *Id.* 936. *Braithwaite v. Harrison*, 3 *Dowl. N. C.* 210. *Mabon v. Townsend*, 1 *Dowl., N. C.* 634. *Caston v. Kinealy*, 12 *Law J.*, 436, *ex.* *Pigeon v. Osborne*, 12 *Ad. & El.* 715. Instances where it has been holden not to be frivolous. *Bird v. Holman*, 2 *Dowl. N. C.* 234. *Papineau v. King*, 2 *Id.* 226. *Dalton v. M'Intyre*, 1 *Id.* 76. The rule to set aside a demurrer as frivolous, must be drawn up on reading the pleading demurred to, as well as the demurrer. *Danieli v. Lewis*, 1 *Dowl. N. C.* 542.
322. It is not sufficient in the margin of the demurrer books furnished to the judges, to say that the plea, &c. is "bad for the cause specially assigned for demurrer," as is usually done in the margin of the demurrer itself, but the objections intended to be insisted upon must be specifically stated. Where, however, the objection was stated thus—that the plea afforded no answer to the action, and was bad in substance, it was holden sufficient. *Scott et al. v. Chappellow*, 2 *Dowl. N. C.* 78.
322. The party whose pleading is demurred to, cannot argue that a previous pleading of the other party is bad, unless his paper book states the point, although the objection would be available on general demurrer. *Arboun v. Anderson*, 1 *Ad. & El.* 498. But where the paper book thus states the objection to a previous pleading, it is the duty of the opposite party to obtain a copy of the points from the judge's clerk ; and if he fail to do so, the court will nevertheless hear the objections to the previous pleadings, although the other party were not aware of them. *Garrard v. Hardey*, 3 *Dowl. N. C.* 51.
323. Where there are issues in fact as well as of law, it is in

the plaintiff's option (subject to the discretion of the court,) whether he will have the issues in law or in fact first decided ; it is in general more convenient to have the issues in law first determined, because it may render a trial of the issues in fact unnecessary, and because after a trial no amendment can be made upon demurrer. *Crucknell v. Trueman et al.*, 12 *Law J.*, 31, *ex. 2 Dowl. N. C.* 276.

327. Where the issue previous to a writ of trial, omitted the date of the writ of summons, but the date was correctly inserted in the writ of trial ; and the defendant attended at the trial, protested against the proceedings, but a verdict was found for the plaintiff : the court refused to set aside the writ of trial, because the objection should have been taken to the issue. *Cooze v. Neumegen*, 1 *Dowl. N. C.* 429.
328. Where to debt on bond, within stat. 8 & 9 W. 3, c. 11, s. 8, the defendant as to part pleaded performance, and as to another part he pleaded in excuse of performance, the court held that as to the plea of performance, the plaintiff ought to assign the breaches in his replication ; and as to plea excusing the performance, the breaches ought to be suggested. *Webb v. James et al.* 1 *Dowl. N. C.* 36.
328. The court or a judge, in debt on bond where breaches are suggested, may still order the writ of inquiry to be executed before the chief justice, where questions of difficulty are likely to arise. *Goodman v. Morrell*, 1 *Dowl. N. C.* 283.
329. *Notice of Trial.*] Where a notice of trial for the sittings after term, did not specify whether it was for the first or the adjourned sittings ; but the defendant's attorney was apprised that it was for the adjourned sittings, and he never objected to the notice until after the cause was tried : the court held that he thereby waived the irregularity. *Yonge v. Fisher*, 12 *Law J.*, 95, *cp.*
335. *Cognovits and Warrants of Attorney.*] It is no objection to a warrant of attorney, that part of the defeasance is written on a separate sheet of paper annexed. *Burdekin v. Potter et al.* 1 *Dowl. N. C.* 134.
336. If a warrant of attorney be given by a person who is himself an attorney, it is not necessary that it should be attested by an attorney named by him, as required by stat. 1 & 2 Vict. c. 110, s. 9. *Downes v. Garbutt*, 12 *Law J.*, 269, *qb.* 2 *Dowl. N. C.* 939.
336. An objection to the attestation of a warrant of attorney, can be made only by the party who executed it, or by some person duly authorised by him or claiming under

- him. And therefore where an attorney applied to set aside a warrant of attorney, executed by a person who had since gone abroad, on the ground of an insufficient attestation, and his affidavit shewed that he had only a general authority to manage the affairs of the party during his absence: the court would not infer from this an authority in the particular transaction, and discharged the rule with costs. *Lewis v. Earl of Tankerville*, 12 *Law J.*, 234, *ex. 2 Dowl. N. C.* 754.
337. A warrant of attorney cannot be attested by the plaintiff's attorney, *Durrant v. Blurton et al.* 9 *Dowl.* 1015, although the defendant, knowing him to be so, names him for the purpose. *Cocks et al. v. Edwards*, 2 *Dowl. N. C.* 55.
338. Where the attestation stated that the witness signed "as the attorney" of the defendant, without stating him to be so, it was holden insufficient. *Hibbert v. Barton*, 12 *Law J.*, 70, *ex. 2 Dowl. N. C.* 434. *Elkington v. Holland*, 11 *Law J.*, 273, *ex. 1 Dowl. N. C.* 643. And the same, where he described himself to be "the attorney" without saying of the defendant. *Everard et al. v. Poppleton et al.* 13 *Law J.*, 1, *qb.* But where it was "in the presence of me J. N. the attorney of the said W. H." &c. it was holden sufficient. *Knight v. Hasty*, 12 *Law J.*, 293, *qb.*
338. And there being two attestations, the second added on account of the first being insufficient, was holden not to affect the validity of the instrument. *Ledgard v. Thompson*, 12 *Law J.*, 229, *ex. 2 Dowl. N. C.* 766.
338. If the warrant of attorney or cognovit be not filed within twenty-one days, it cannot in any case or at any distance of time be made available in the event of the bankruptcy or insolvency of the party giving it, although the judgment may have been entered up, execution issued, and seizure and sale of the goods effected, long before the act of bankruptcy or imprisonment of such party, and no fraud be in fact suggested. *Biffin et al. v. Yorke*, 12 *Law J.*, 162, *cp.*
338. As to the effect of filing warrants of attorney and cognovits, with respect to the assignees of insolvents, see *Lawrence et al. v. Lawrence*, 12 *Law J.*, 346, *qb.* 1 & 2 *Vict. c.* 110, *s.* 60. 3 *Dowl. N. C.* 219.
340. Where a warrant of attorney was given on the 31st March 1830, authorizing the judgment to be entered "as of Michaelmas term last, Hilary term next, or of any subsequent term, with a defeasance to secure 1000*l.* on the 16th December next," and judgment was signed on the 21st April, 1830: the court held that it was not clear that the judgment was not authorized by the warrant;

and as it was sworn that it was agreed by all parties that the judgment should be entered up immediately, and the objection was not made until eleven years after the judgment had been signed, the court refused to set it aside. *Fernell et al. v. Adams*, 12 *Law J.*, 81, *qb.* 1 *Dowl. N. C.* 869.

340. Where a warrant of attorney authorizes judgment to be signed as of a term, it does not authorize a judgment to be signed in vacation; and where it authorized the attorney to appear as of Trinity term last, Michaelmas term next, or of some subsequent term, and then and there to receive a declaration, &c., and thereupon to confess the said action, or to suffer judgment, &c., it was holden that judgment could not be signed in vacation. *Rayment v. Smith*, 12 *Law J.*, 279, *qb.*, 3 *Dowl. N. C.* 166. But where in a warrant of attorney given to a surety, the defeasance, after reciting that the warrant was given to secure the plaintiff from all responsibility, and to give him the means of providing for the payment of the bills for which he was surety, empowered him "at any time, or from time to time, to take out execution for the whole or any part of the amount;" the court held that he might at any time take out execution for the whole of the amount of the bills, and that he was not confined to the sum which had then become due in respect of them. *Duke v. Watchorn*, 11 *Law J.*, 53, *qb.*
340. Where judgment is sued out at a time not authorized by the warrant, the court, at the instance of the plaintiff will set it aside, so as to give him an opportunity of signing it rightly. *Coulson v. Clutterbuck*, 2 *Dowl. N. C.* 391.
340. Where the defeasance shewed that the debt was to bear interest, the court referred it to the master to ascertain what was due for interest, and granted a rule nisi for judgment for the debt and interest, although the penalty in the instrument was for the amount of the debt only. *Chalk v. Wolton*, 3 *Dowl. N. C.* 39.
341. In ejectment, where a warrant of attorney authorizes the lessor of the plaintiff to enter up judgment, it must be entered up in the name of the nominal plaintiff. *Doe v. Stewart*, 1 *Dowl. N. C.* 813. And where a tenant had given his landlord a warrant of attorney, authorizing him to determine the tenancy by a certain notice to quit, and upon his not quitting in pursuance of such notice to sign judgment in ejectment and issue execution: the court, upon affidavit of such notice and of the consequent determination of the tenancy, and of the fact that the tenant refused to quit the premises,

- granted a rule for judgment upon the warrant of attorney. *Doe v. Beaumont*, 2 Dowl. N. C. 972.
342. Upon an application to enter up judgment on an old warrant of attorney, the court refused to grant more than a rule to shew cause, under the peculiar circumstances of the case, although the warrant was not ten years old. *Edwards v. Holiday*, 9 Dowl. 1023.
342. Upon an application on the 17th January, to enter up judgment on an old warrant of attorney, on an affidavit that the deponent had seen the defendant alive on the 28th October preceding, and had since been told and believed that he was alive within a few weeks:—this was holden insufficient. *Levi v. Cohen*, 12 Law J., 137, *qb.*, 2 Dowl. N. C. 687. But where the warrant was upwards of ten years old, and the rule a rule nisi only, Patteson J. granted it in such a case, but said that if it were a rule absolute in the first instance he would not do so. *Hawke v. Harris*, 1 Dowl. N. C. 261.
342. Where in moving for judgment on an old warrant of attorney, executed by two persons jointly, and not jointly and severally, it appeared that only one of them had been seen alive within a certain time, Patteson J. refused the rule, saying that it ought to be shewn that both were alive. *Lot v. Anderson*, 1 Dowl. N. C. 305.
343. An affidavit that the deponent believes the defendant to be alive, having heard from him, and one of his neighbours having told defendant that he was in good health on Friday last,—was holden insufficient, the latter being mere hearsay, and no time being stated as to when he heard from him. *Key v. Montague*, 1 Dowl. N. C. 853.
343. Where the deponent swore that he saw the defendant, but did not say that he saw him alive, it was holden insufficient, although he swore that he believed he was living. *Watson v. Matthews et al.* 12 Law J., 139, *qb.*, 2 Dowl. N. C. 670.
343. And in all cases the deponent must swear that he believes the defendant to be still alive, although the latter be abroad. *Richardson v. Scholefield*, 2 Dowl. N. C. 36.
343. An affidavit by the clerk of the plaintiff's attorney, that the sum secured by the warrant of attorney is due, and having received different payments on account, and having lately seen the defendant, who promised to pay a further instalment upon it,—was holden sufficient proof of the debt being still due. *Middleton v. Stockdale*, 1 Dowl. N. C. 776.
343. In moving for judgment on an old warrant of attorney, the affidavit stated various unsuccessful endeavours to find the attesting witness, and then stated an admission by the defendant of his liability, and an acknowledg-

- ment by him of the handwriting of the attesting witness: this was holden a sufficient substitute for the affidavit of the attesting witness. *Reid v. Ford*, 1 Dougl. N. C. 187.
343. Where the attesting witness had been transported, and no information respecting him could be obtained, the court allowed judgment to be signed, on producing an affidavit of his handwriting, and of that of the defendant. *Edwards v. Penney*, 2 Dougl. N. C. 425.
343. Where the warrant of attorney had before been filed, with an affidavit of its execution by the attesting witness, Patteson, J. held that an office copy of that affidavit would be sufficient, upon moving for judgment. *Bland v. Wilson*, 1 Dougl. N. C. 260.
343. Where, by mistake, a copy instead of the original of the warrant of attorney had been filed, the court, upon an application to enter up judgment, on an affidavit that the original warrant was lost, and the attesting witness dead, granted the rule, on an affidavit of its execution formerly made by the attesting witness upon another occasion. *Doe v. Beaumont*, 2 Dougl. N. C. 972.
343. A copy instead of the original of a warrant of attorney being filed with the clerk, at the time of signing judgment, was holden not to be a sufficient ground to set aside a judgment on a warrant of attorney signed eight years before. *James v. Heward*, 12 Law J., 58, *qb*.
344. Where the loser of money at play, gave his bill upon E. M. to the winner for the amount, who indorsed it to an innocent indorsee for value; the latter having brought an action upon the bill against the drawer, he gave a cognovit: it was holden that this cognovit could not be impeached on account of the illegality of the original consideration for the bill. *Lane v. Chapman*, 11 Ad. & El. 966.
345. The court will not set aside a judgment on a warrant of attorney, merely on account of the inadequacy of the stamp. *Hartley v. Manson*, 11 Law J., 199, *cp*. 1 Dougl. N. C. 711. And where a rule nisi had been granted on this ground, but upon shewing cause the warrant was produced with a sufficient stamp upon it, the court discharged the rule, without imposing the terms of paying costs. *Brembridge v. Wildman*, 1 Dougl. N. C. 774.
345. Where the plaintiff sought to enforce a warrant of attorney, not for the debt for which it was originally given, but for subsequent advances, the court, at the instance of the assignees of the defendant, who had become bankrupt, set aside the plaintiff's proceedings, although the plaintiff swore that he understood

that the warrant was intended to cover subsequent advances. *Bell v. Tidd*, 9 *Dowl.* 949.

345. Upon an application to set aside a warrant of attorney, as given upon an agreement to compound a felony, the affidavit must shew such agreement distinctly; and therefore it was holden that it was not sufficient to shew that it had been given by a clerk to his master for the amount of a debt, and that a threat of a prosecution for embezzlement had been holden out by the master, which might have induced the clerk to give the security, but there did not appear to be any agreement for a compromise, and the court accordingly refused to interfere. *Ward v. Lloyd*, 13 *Law J.*, 5, *cp.*
345. Where it was sought to set aside a warrant of attorney, for usury, on the ground that it was given as a collateral security with a security on land, Coleridge J. refused to interfere, as it appeared doubtful whether the usurious transactions had not taken place subsequently to the giving of the warrant of attorney. *Downes v. Garbutt*, 2 *Dowl. N. C.* 939.
346. The court will entertain a motion by the defendant to set aside a judgment upon a warrant of attorney, signed against good faith, although the defendant has become bankrupt, and assignees are appointed. *Pinches v. Harvey*, 1 *Ad. & El. N. C.* 868.
347. The court refused, at the instance of a purchaser, to order satisfaction to be entered upon a judgment on a warrant of attorney, upon his payment of the debt for which the vendor had originally given the warrant, with interest, it appearing that the vendor had subsequently agreed with the plaintiff to allow the judgment to stand as a security for further advances, and this agreement being known to the vendor at the time he made his purchase. *Crafts v. Wilkinson*, 12 *Law J.*, 153, *qb.*
349. Where there were four defendants, and issue was joined as against three of them, but not as against the fourth, who had obtained his discharge under the insolvent act, since action brought: the court discharged a rule for judgment as in case of a nonsuit, on the ground that no complete issue was joined. *Jackson v. Uiting et al.*, 12 *Law J.*, 129, *ex.*, 2 *Dowl. N. C.* 543.
349. Judgment as in case of a nonsuit may be obtained in ejectment, if the defendant have appeared and pleaded, and issue have been joined, although through the default of the lessor of the plaintiff the consent rule have not been drawn up. *Doe v. Smith*, 9 *Dowl.* 1011.
349. A plaintiff in a town cause, having given notice of trial, but not having proceeded to trial in pursuance of his notice, the defendant obtained his costs of the day in



- Easter term ; and the plaintiff not having given any subsequent notice of trial, the court in Trinity term, held that the defendant was entitled to move for judgment as in the case of a nonsuit. *Doe v. Templeton*, 12 *Law J.*, 367, *qb.*, 3 *Dowl. N. C.* 194.
349. In a town cause, if issue be joined in Hilary term, the motion may be made in Trinity term. *Heeles et al. v. Kidd*, 10 *Mees. & W.*, 76, 1 *Dowl. N. C.* 663. *Ellis v. Stebbing*, 2 *Id.* 118, *Id.* 326.
350. In a country cause, where issue was joined in Michaelmas term, a motion for judgment as in case of a nonsuit in Trinity term, was holden to be too early. *Ellis v. Stebbing*, 12 *Law J.*, 93, *cp.*, 2 *Dowl. N. C.* 118, and see *Id.* 326. *S. P. Crook v. Merriman*. 3 *Dowl. N. C.* 162.
351. Where the trial is to be before the sheriff, &c., the time for moving for judgment as in case of a nonsuit is the same as where the case is to be tried at *nisi prius*. *Harrison v. Jones*, 11 *Mees. & W.* 105.
352. The affidavit upon which the motion is made, must shew whether the cause be a town or country cause, unless the motion, whether it be a town or country cause, appear to be in proper time. *Withers v. Spooner*, 12 *Law J.*, 130, *cp.*, 2 *Dowl. N. C.* 884.
352. Where the motion is made by one of several defendants, it must be for judgment as in case of nonsuit, with respect to all the defendants generally ; but if there be any mistake in this respect, the rule may be amended. *Sawyer v. Hodges et al.*, 1 *Dowl. N. C.* 16.
354. Where the defendant, who had filed his schedule under the insolvent act, and inserted the plaintiff's claim in it, afterwards applied for judgment as in case of a nonsuit, the court discharged his rule with costs, although it did not appear at what time the plaintiff knew of the insolvency. *Featherstone v. Bourne*, 12 *Law J.*, 102, *qb.*, 2 *Dowl. N. C.* 389.
354. Where, in answer to a rule for judgment as in case of a nonsuit, it was shewn that the cause had been settled by the parties without the knowledge of their attorneys, each agreeing to pay his own costs : the court discharged the rule, the costs to be costs in the cause. *Payne v. Haredale*, 1 *Dowl. N. C.* 525 ; and see *Wortley v. Gedge*, 2 *Dowl. N. C.* 937.
354. Whilst a demurrer is pending, the defendant cannot have judgment in case of a nonsuit with respect to the issues in fact, although the plaintiff have given notice of trial. *Milton v. Griffiths*, 1 *Dowl. N. C.* 769.
354. An affidavit, by the plaintiff's agent, that he was " informed and verily believed that the plaintiff was not prepared with sufficient evidence to go to trial," was holden to

- be a sufficient excuse ; and the rule was discharged on a peremptory undertaking. *Farmer v. Cross*, 2 Dowl. N. C. 387.
354. But that a proposal not to proceed with the action was made by the plaintiff, shortly before the cause ought to be tried, to which no answer was given by the defendant, is not a sufficient reason for the plaintiff's not having proceeded to trial. *Swift v. Goodhead*, 12 Law J., 101, *qb*. So, even where the plaintiff abstained from proceeding to trial, in consequence of a proposal from the defendant that it should await the event of another action ; and the other action was determined in time to enable the plaintiff to have proceeded to trial at the next assizes : his not doing so, is a default, which entitles the defendant to move for judgment as in case of a nonsuit. *Garven v. Birch et al.*, 11 Mees. & W. 544. But where, in such a case the negotiation continued until the time for proceeding to trial had elapsed, and the defendant, in the term after, moved for judgment, the court discharged the rule, and with costs, as being against good faith. *Forbery v. Butler et al.*, 2 Dowl. N. C. 390.
354. Where the insolvency of the defendant is the excuse for not having proceeded to trial, it is not sufficient to swear to it from "information and belief." *Roden v. Stewart*, 1 Dowl. N. C. 771. See *Bailey v. Elgie*, *id.* 853.
354. Where issue was joined on the 20th July, and notice of trial was given on the same day, but notice of countermand was given on the 25th, an affidavit that the plaintiff did not proceed to trial on account of the insolvency of the defendant, of which he was not aware at the time of issue joined, was holden insufficient to discharge a rule for judgment as in case of a nonsuit, without a peremptory undertaking, the plaintiff not having stayed his proceedings as soon as he knew of the insolvency. *Aitcheson v. Marsh*, 2 Dowl. N. C. 943.
356. Where the motion was made in Hilary term, and it was offered to give a peremptory undertaking to try at the sittings after Easter term, the court refused to do it, but discharged the rule upon such undertaking to try at the sittings after that term. *Cook v. Brookes*, 1 Dowl. N. C. 504.
356. Where in an action by husband and wife in right of the wife as executrix, the husband gave a peremptory undertaking to try, and died, it was holden that the wife afterwards was not bound by the undertaking. *Lee et ux. v. Armstrong*, 9 Mees. & W. 14.
357. Where there were issues in law and in fact, and the issues in law were adjudged for the defendant ; the plaintiff

not having proceeded to trial on the issues in fact, the defendant who had since become bankrupt, applied for judgment as in case of nonsuit, and the plaintiff offered a *stet processus* : there being some difficulty in entering a *stet processus* as to some of several issues, it was agreed that the plaintiff should enter a *nolle prosequi*, as to the issues in fact, without costs, with liberty to the defendant to proceed for his costs upon the demurrer. *Quarrington v. Arthur*, 11 Mees. & W. 491.

359. *Costs of the Day.*] Where there were issues in law and in fact, and whilst the issues in law were pending, the plaintiff gave notice of trial of the issues in fact, but did not proceed to trial in pursuance of his notice; it was holden that the defendant was entitled to costs of the day, though not to judgment as in case of nonsuit. *Milton v. Griffiths*, 1 Dowl. N. C. 769.
359. The defendant is entitled to costs of the day, although the plaintiff is prevented from trying his cause by an irregularity, which the defendant refuses to waive. *Cook v. Smith*, 1 Dowl. N. C. 861.
360. In taxing the costs of the day, where it appeared that the cause was set down for trial at one sittings, but from the length of the cause list it was not then tried, and at the next sittings the plaintiff withdrew the record: it was holden that the defendant was not entitled to his costs of the first sittings. *Brett v. Stone*, 12 Law J., 365, *qb.*, 3 Dowl. N. C. 140.
362. *Nisi Prius Record.*] Where the *nisi prius* record omitted the dates of the *venire* and *habeas corpora* in the award of them, &c., and the defendant objected to the cause being tried, although he had the plaintiff under terms to try at those particular sittings, the judge allowed the cause to proceed; and the defendant having brought a writ of error *coram vobis* for this defect, the court allowed the plaintiff, in making up the roll, to insert the dates. *Ouchterlony v. Gibson*, 4 Man. & Gr. 461.
363. Where the plaintiff's attorney neglected to obtain or annex to the record, a writ of *distringas juratores*, and there was a verdict for the plaintiff, the court refused to interfere, upon the application of the defendant, either by granting a new trial or a *venire de novo*. *Geer v. Swan*, 1 Dowl. N. C. 896.
363. If the plaintiff do not enter his cause in time, the defendant may enter a *ne recipiatur* with the judge's marshal, which will have the effect of rendering the notice of trial a nullity; and the plaintiff must afterwards give a new notice of trial, and not merely a

notice by continuance. *Fitch et ux. v. Burton*, 2 Dowl. N. C. 958.

365. *Jury Process*.] Where the *distringas* by mistake was made returnable in vacation instead of in term, the court allowed it to be amended even after error brought. *Cheese v. Scales*, 12 Law J., 14, *ex.* They also refused to set aside the verdict for this cause. *Id.* 13, *ex.*
368. Where the plaintiff obtained a rule for a special jury, and the cause was appointed for a particular day, the plaintiff having neglected to have the jury summoned, none of them of course appeared, and the cause was tried by a common jury as an undefended cause: the court held it to be irregular, and set aside the verdict with costs. *Hague v. Hall*, 3 Dowl. N. C. 83.
368. It is not necessary that the certificate for the costs of a special jury shall be granted immediately after the trial; if it be granted within a reasonable time after, it will be sufficient. *Christie v. Richardson*, 12 Law J., 86, *ex.*, 2 Dowl. N. C. 503.
338. But where it was applied for, and the judge agreed to grant it, immediately after the trial, but it was not signed by the judge for some weeks afterwards, this was holden insufficient. *Grace v. Clinch*, 12 Law J., 273, *qb.*
375. *Trial at Nisi Prius*.] Where there is a challenge to the array or polls, it should be entered on the nisi prius record, together with the grounds of it. *Mayor, &c. of Carmarthen v. Evans et al.* 2 Dowl. N. C. 296.
377. An objection to the competency of a witness, may be made at any period of the case, even although he may not have been examined on the *voire dire*. *Jacobs v. Layborn*, 12 Law J., 427, *ex.*
380. Where the plaintiff, having a certificate for immediate execution, sued out a *ca. sa.* for the amount of the damages and costs, but indorsed it to levy the amount of the damages only; and the damages being paid, it was holden that the plaintiff could not sue out a second writ of execution for the costs. *Smith v. Dickenson*, 3 Dowl. N. C. 155.
381. *Trial before the Sheriff, &c.*] Where a special action of assumpsit for unliquidated damages, was tried before the sheriff upon a writ of trial, the court upon application set aside the writ of trial and proceedings, on the ground that the case was not within the statute, although the writ was indorsed for 12*l.* 19*s.* only, and the plaintiff by his particulars claimed only 7*l.* 10*s.* *Lismore v. Beadle*, 1 Dowl. N. C. 566.

381. So, where the first count of the declaration was for not using premises in a tenant-like manner, the second for use and occupation, and the third on an account stated, and the case was tried before the sheriff, and a verdict given for the plaintiff: the court set aside the verdict, on the ground that the case was not within the statute, although the writ was indorsed for 17*l.* only, and the particulars claimed 15*l.* for rent, and 2*l.* for non repair and improper use of the premises. *Raffey v. Shoobridge*, 9 *Dowl.* 957.
381. Detinue is within the statute, and may be tried before the sheriff on a writ of trial, where the thing sought to be recovered is laid at a value not exceeding 20*l.* *Walker v. Needham*, 1 *Dowl. N. C.* 220.
382. Where upon a trial before the sheriff, in an action of debt, the verdict was for 20*l.* debt and 1*s.* damages, the court held that the 1*s.* damages did not make the demand more than 20*l.* and that therefore the case was within the statute, and triable before the sheriff. *Gutteridge v. Seth*, 12 *Law J.*, 249, *qb.* 2 *Dowl. N. C.* 954.
382. Where the writ was indorsed for 19*l.* 4*s.* 7*d.*, with interest (not saying from what time), and on a trial before the sheriff, the jury having given a verdict for 23*l.* 5*s.* 1*d.*, the plaintiff entered a *remittitur* for 3*l.* 5*s.* 1*d.*, the court held that the case was within the statute, and that the error in the verdict was properly cured by the *remittitur*; they held also that the plaintiff having judgment on demurrer on one of several pleas to the action, the notice of trial might be not only to try the issues joined, but to assess damages on the demurrer. *Fryer et al. v. Smith*, 12 *Law J.*, 223, *cp.* 3 *Dowl. N. C.* 75.
382. Where the objection is that the case is not within the statute, the motion should be, not for a new trial, but to set aside the writ of trial and all subsequent proceedings. *Walker v. Needham*, 1 *Dowl. N. C.* 220.
383. Where the issue omitted the date of the writ of summons, but no objection was made to it until the trial, which was 16 days after the delivery of the issue, the court held the objection to be too late, and refused to set aside the issue and writ of trial, &c. *Cooze v. Neumegen*, 9 *Mees. & W.* 290, 1 *Dowl. N. C.* 429. And in a similar case, but where the defendant did not appear at the trial, the court held that he had waived the irregularity by not returning the issue, and allowing the cause to proceed to trial. *Wilson v. Nisbett*, 4 *Man. & Gr.* 249, 1 *Dowl. N. C.* 675.
384. Where the writ of trial omitted the day of the month in the teste, and was made returnable "immediately," instead of on a day certain in term, these were holden

- to be irregularities; but the objection not being taken until after the trial, the court held that it was too late. *Masters v. Davy*, 12 *Law J.*, 69, *qb.*
384. A trial before a deputy of the under-sheriff, is bad, and the court will set aside the verdict; but where the objection was not made at the trial, Coleridge J. set it aside without costs. *Jones v. Williams*, 2 *Dowl. N. C.* 938, 12 *Law J.*, 295, *qb.*
384. Where the sheriff is defendant, it seems that the plaintiff cannot have the writ of trial directed to the coroner, for the coroner is not mentioned in the statute. See *Levy v. Magnay*, 12 *Law J.*, 345, *ex.*
385. Where notice of trial was given and countermanded, on a writ of trial returnable the 1st March, and afterwards on the 5th March the trial took place, without altering the return or re-sealing the writ; Coleridge J. held that the trial was void and must be set aside; and that the fact of the defendant attending at it, and defending the action, was immaterial. *Ashburton v. Sykes*, 3 *Dowl. N. C.* 133, 12 *Law J.*, 300, *qb.*
385. There may be notice of trial by continuance, in the case of a trial before the sheriff in Middlesex or London, in the same manner as in actions tried at *nisi prius*. *Wilson v. Nesbitt*, 1 *Dowl. N. C.* 675, 4 *M. & Gr.* 249.
386. An objection to the jurors, that their names are not on the jury list for the county, is waived by the defendant's acquiescence at the trial, even although at that time he had no knowledge of the circumstance. *Pryme v. Titchmarsh*, 12 *Law J.*, 45, *ex.*, 2 *Dowl. N. C.* 474.
389. *Notice to produce.*] Where in an action on a bill of exchange, the only plea was as to the illegality of the bill, and issue was taken upon it, and the defendant had to prove it: it was holden that he could not call upon the plaintiff to produce the bill at the trial, not having given him notice to produce it. *Goddered v. Armour*, 12 *Law J.*, 56, *qb.*
389. The contents of a notice merely hung up in the cabin of a steam packet, cannot be given in evidence in an action against the owners, without giving them notice to produce the original; but it would be otherwise if it were fixed, so that it could not be removed. *Jones v. Tarleton*, 1 *Dowl. N. C.* 625.
389. A notice to produce "all letters written to and received by the plaintiff between the years 1837 and 1841, both inclusive, by and from the defendants or either of them, or by or to any person on their or the plaintiff's behalf respectively"—was holden sufficiently certain. *Morris et al. v. Hannen et al.* 1 *Car. & M.* 29.

2. "It is further ordered, that the examiners so to be appointed shall conduct the said examinations, under regulations to be first submitted to and approved by the judges." (*Vide infra.*)

3. "And it is further ordered, that in case any person shall be dissatisfied with the refusal of the examiners to grant such certificate, he shall be at liberty to apply for admission by petition in writing to the judges, to be delivered to the clerk of the lord chief justice of the court of Queen's Bench, upon which no fee or gratuity shall be received; which application shall be heard in Serjeant's Inn Hall, by not less than three of the judges."

4. "And whereas the hall or building of the incorporated Law Society of the United Kingdom in Chancery-lane will be a fit and convenient place for holding the said examination, and the said society have consented to allow the same to be used for that purpose: it is further ordered, that until further order, such examinations be there held on such days, being within the last ten days of every term, as the said examiners, or any five of them, shall appoint; and that any person not previously admitted an attorney of any of the three courts, and desirous of being admitted, shall in addition to the notices already required, give a term's notice to the said examiners of his intention to apply for examination, by leaving the same with the secretary of the said society at their said hall, which notice shall also state his place or places of residence, or service, for the last preceding twelve months, and in case of application to be admitted, on a refusal of the certificate, shall give ten days' notice, to be served in like manner, of the day appointed for hearing the same." So, if the clerk upon his examination be found deficient in his answers, he must give fresh notice before he appears a second time to be examined, *Re Examiners*, 8 *Ad. & El.* 745. *Re Henry*, 8 *Law J.*, 12, *qb.*, unless under peculiar circumstances the court dispense with it. *See Re Examiners*, 9 *Ad. & El.* 728. *Ex p. Grimstone*, 8 *Dowl.* 304.

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*Regulations approved by the Judges in Easter term, 1836, for the examination of persons applying to be admitted as attorneys of the courts of Queen's Bench, Common Pleas, or Exchequer, pursuant to the rule of court made in Hilary term, 1836.*

After reciting the rule just now mentioned; and reciting that "by a rule of all the said courts made in this present Easter term, it was ordered that the several masters and prothonotaries for the time being, of the said courts respectively,

together with Thomas Adlington, Jonathan Brundrett, George Frere, James William Freshfield, James Hall, Bryan Holme, William Lowe, Edward Rowland Pickering, Samuel White Sweet, William Tooke, Richard White, and Edward Archer Wilde, gentlemen, attorneys; should be, and the same were thereby appointed examiners for one year then next ensuing, to examine all such persons as should desire to be admitted attorneys of all or either of the said courts, from and after the last day of that term; and that any five of the said examiners (one of them being one of the said masters or prothonotaries) should be competent to conduct the said examination in pursuance of, and subject to, the provisions of the said rule, in Hilary term last.

In pursuance of the said rules, the following regulations for conducting the said examinations have been submitted to, and approved by, the judges of the said courts:—

1. "That every person applying to be admitted an attorney of any of the said courts, pursuant to the said rules shall, within the first seven days of the term in which he is desirous of being admitted, leave, or cause to be left, with the secretary of the said incorporated Law Society, his articles of clerkship duly stamped, and also any assignment which may have been made thereof, together with answers to the several questions hereunto annexed, [*post*, p. 480,] signed by the applicant, and also by the attorney or attorneys with whom he shall have served his clerkship." Where the clerk was a day too late in sending in his answers, &c., owing to his master not having arrived in London in time, Williams J. allowed it to be done *nunc pro tunc*. *Ex p. Lyons*, 6 Dowl. 517.

2. "That in case the applicant shall shew sufficient cause to the satisfaction of the examiners, why the first regulation cannot be fully complied with, it shall be in the power of the said examiners, upon sufficient proof being given of the same, to dispense with any part of the first regulation that they may think fit and reasonable."

3. "That every person applying for admission, shall also, if required, sign and leave, or cause to be left, with the secretary of the said society answers in writing to such other written or printed questions as shall be proposed by the said examiners touching his said service and conduct, and shall also, if required, attend the said examiners personally, for the purpose of giving further explanation touching the same; and shall also, if required, procure the attorney or attorneys with whom he shall have served his clerkship as aforesaid, to answer, either personally or in writing, any questions touching such service or conduct, or shall make proof to the satisfaction of the said examiners of his inability to procure the same. "Where one of the masters to whom the clerk had been assigned, had absconded, so that the latter part of this regulation could not



be entirely complied with, Williams, J., notwithstanding, ordered the clerk to be examined. *Ex p. Carr*, 1 Dowl. N. C. 565.

4. "That every person so applying, shall also attend the said examiners at the hall of the said society at such time or times as shall be appointed for that purpose, pursuant to the said rule, as the said examiners shall appoint, and shall answer such questions as the said examiners shall then and there put to him, by written or printed papers, touching his fitness and capacity to act as an attorney." (*See the instructions, post*, p. 480 b.)

5. "That upon compliance with the aforesaid regulations, and if the major part of the said examiners actually present at, and conducting the said examination (one of them being one of the said masters or prothonotaries), shall be satisfied as to the fitness and capacity of the person so applying to act as an attorney, the said examiners so present, or the major part of them, shall certify the same, under their hands, in the following form, viz. :—

"In pursuance of the rules made in Hilary and Easter terms, 1836, of the courts of King's Bench, Common Pleas, and Exchequer: We, being the major part of the examiners, actually present at, and conducting the examination of A. B. of, &c., Do hereby certify, that we have examined the said A. B. as required by the said rules, and we do testify, that the said A. B. is fit and capable to act as an attorney of the said courts."

It may be necessary to mention, that the clerk cannot be examined until he has attained the age of twenty-one, *Ex p. Cragg*, 6 Dowl. 256, unless the court, under particular circumstances, allow of it; see *Ex p. Tebbs*, 9 Dowl. 151. *Ex p. Bougfield*. *Id.* 616, 10 Law J., 361, *qb*; nor before the expiration of the time for which he was bound. *Ex p. Bartlett*, 7 Dowl. 699. 6 & 7 Vict. c. 73, s. 3. *ante*, p. 50.

If the examiners refuse to examine the clerk, on account of any alleged defect in the service, the court upon application will direct them to examine him *de bene esse*, leaving the question as to the validity of the service open for the consideration of the court. *Examiner's case*, 5 Bing. N. C. 70. *S. C. nom. Ex. p. Masterman*, 7 Dowl. 156.

*Questions as to due service to be answered by the clerk.*

1. What was your age on the day of the date of your articles?
2. Have you served the whole term of your articles at the office where the attorney or attorneys, to whom you were ar-

titled or assigned, carried on his or their business? and if not, state the reason.

3. Have you at any time during the term of your articles been absent without the permission of the attorney or attorneys to whom you were articulated or assigned? and if so, state the length and occasions of such absence.

4. Have you, during the period of your articles, been engaged or concerned in any profession, business, or employment, other than your professional employment, as clerk to the attorney or attorneys to whom you were articulated or assigned?

5. Have you since the expiration of your articles been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment, other than the profession of an attorney or solicitor?

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*Questions as to due service to be answered by the attorney.*

1. Has A. B. served the whole term of his articles at the office where you carry on your business? and if not, state the reason.

2. Has the said A. B., at any time during the term of his articles, been absent without your permission? and if so, state the length and occasion of such absence.

3. Has the said A. B., during the period of his articles, been engaged or concerned in any profession, business, or employment, other than his professional employment as your articulated clerk?

4. Has the said A. B., during the whole term of his clerkship, with the exceptions above mentioned, been faithfully and diligently employed in your professional business of an attorney or solicitor?

5. Has the said A. B., since the expiration of his articles, been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment other than the profession of an attorney and solicitor?

And I do hereby certify, that the said A. B. hath duly and faithfully served under his articles of clerkship (or assignment, as the case may be,) bearing date, &c., for the term therein expressed, and that he is a fit and proper person to be admitted an attorney.

*The examiners also have published the following "Instructions to the Candidates for Examination."*

The candidates for examination are requested to attend to the following directions :—

Each candidate will have a number given to him, and will take his seat at the table according to such number.

A paper of questions will be delivered to him, with his name and number upon it, containing questions to be answered in writing, classed under the several heads of,—

- |  |   |
|--|---|
| 1. Preliminary.  | 4. Equity and practice of the courts.     |
| 2. Common and statute law, and practice of the courts. | 5. Bankruptcy and practice of the courts. |
| 3. Conveyancing.                                       | 6. Criminal law.                          |

Each candidate is required to answer *all* the preliminary questions (No. 1.) ; but it is not expected that he should answer *every* question under each of the other heads.

The answers to the questions under the several heads are to be written on *separate* papers, prefixing to each answer the number of the question ; and each paper should be written in a plain and legible manner, and signed.

When the candidate has finished his answers, he will deliver them, together with his printed copy of the questions, at the examiners' table : and he will then receive a ticket, which he is to give to the person at the door when he goes away.

No candidate will be allowed to communicate with, receive assistance from, or copy from the paper of another ; and in case this rule is discovered to be infringed, such person will be considered not to have passed his examination.

\*.\* *After the examination has begun, no candidate is to leave the hall (without permission obtained), until he shall have delivered in his answers ; and any candidate who leaves the hall without permission, will not be allowed to return.*

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